TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 214, 126

THE BIENVILLE WATER SUPPLY COMPANY, APPELLANT,

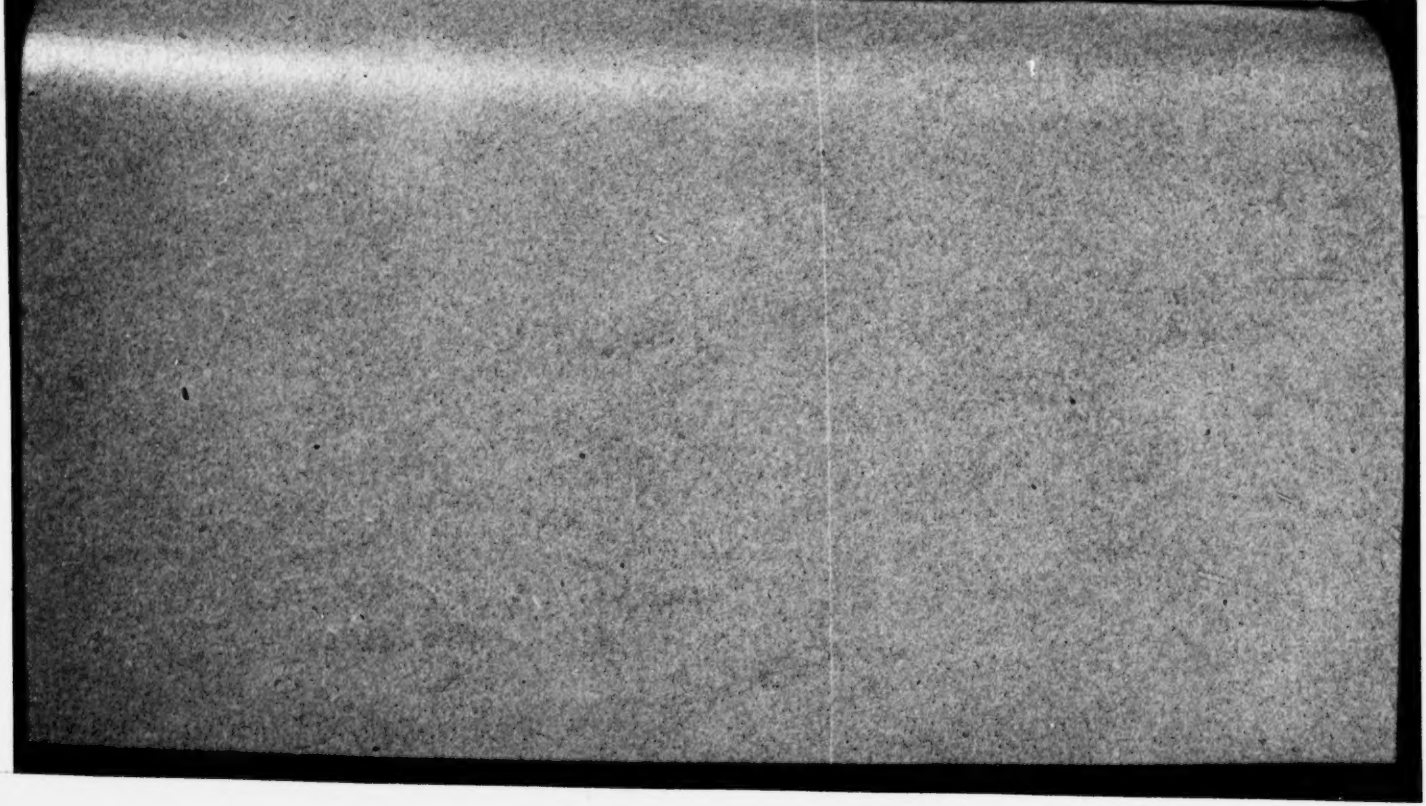
vs.

THE CITY OF MOBILE AND JOHN CURTIS BUSH, MAYOR THEREOF.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED AUGUST 4, 1900.

(17,859.)



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1 *Bill of Complaint and Exhibits.*

Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama. In Equity.

THE BIENVILLE WATER SUPPLY COMPANY, a Corporation Chartered by the General Assembly of the State of Alabama, Complainant,
vs.
THE CITY OF MOBILE, a Municipal Corporation, and John Curtis Bush, as the Mayor Thereof. } No. 209.

To the honorable the judges of the United States circuit court in and for the southern district of Alabama:

The Bienville Water Supply Company, a corporation of the State of Alabama, brings this its bill of complaint against the City of Mobile, hereinafter called the city, a municipal corporation of the State of Alabama, and against John Curtis Bush, as mayor of said city, and complains as follows:

First. It is a corporation originally chartered by an act of the General Assembly of Alabama approved February 19th, 1883, which said act is amended by a further act of said legislative body approved February 14th, 1885. Said original act of incorporation is set forth in the Pamphlet Acts of the Legislature of Alabama for 1882–'3, pages 451 *et seq.*; said amending act is set forth in said Pamphlet Acts for 1884–'5, pages 489–'90. Its home office, principal place of business, and situs are in the city of Mobile. The 11th section of said original act of incorporation provides that "said corporation shall have and enjoy the exclusive right and privilege of conducting and bringing water from any other source than Three Mile creek in the county of Mobile for the supply of said port, * * * for the period of 20 years from the time said water shall have been brought into, and be ready for distribution within the corporate limits of said port, and till the municipal authorities of said port, * * * if so by law authorized shall purchase the water works and property of said corporation, as hereinafter
2 provided; but said corporation must, within two years from the passage of this act, begin its works, and within four years cause water to be conducted into the port of Mobile for distribution from some stream or point as hereinbefore named; and if and when any existing claim to bring water from Three Mile creek has been obtained, then said corporation shall have the exclusive right to supply the port * * * aforesaid for the period and upon the terms aforesaid."

Said section 11 of said original act of incorporation was amended by the third section of the aforementioned act of 1884–'5, so as to read, as far as concerns the relief sought in the bill, as follows:

"That said corporation shall have and enjoy the exclusive right of conducting and bringing water from any point, other than Three Mile creek in the county of Mobile, for the supply of said port of

Mobile and village of Whistler for the period of twenty years from the time when said water shall have been brought within the limits of the port of Mobile and be ready for distribution and supply to the inhabitants of the port of Mobile and the houses and dwellings within the limits of said port. And till the municipal authorities of said port and village, if so by law authorized, shall purchase the water works and property of said corporation as hereinafter provided, but said corporation, within four years from the passage of this act, must begin its works, and within six years from the date of the passage of this act, must cause water to be conducted into the port of Mobile from some stream, point or place as hereinbefore named, and if and when any existing claim to conduct water into Mobile from Three Mile creek, or any other point without the limits of said port, has been obtained by this corporation, then said corporation shall have the exclusive right to supply said port and village and the inhabitants thereof with water for the period and term aforesaid. But nothing in this act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining
3 water pertaining to this company." This complainant did begin its works within four years from the date of the passage of said act of February 14th, 1885, and did within six years from the date of the passage of said act cause water to be conducted into said city from what is known as Clear creek, about ten or twelve miles therefrom.

Defendant the city is a municipal corporation chartered by the legislature of Alabama by an act approved on the 6th day of February, 1897, and defendant John Curtis Bush is the duly elected and acting mayor of said municipal corporation.

Second. Your orator was so chartered for the purpose, among others, of supplying water to defendant the city, which then had the corporate name of the port of Mobile, and to the inhabitants thereof. By its charter of incorporation orator was and is charged with the duty of introducing into said city such supply of pure water as the domestic, sanitary, and municipal wants thereof may require, and for that purpose it was authorized to construct all needed canals, ditches, pipes, and aqueducts to carry such water into said city from any point in Mobile county within twenty miles of said city. It was also thereby charged with the obligation of supplying all needed water for the use of the municipal buildings and hospitals of said city and the jail and court-house of said county without charge. Said charter fixed a maximum rate of compensation to be demanded and received by complainant for the supply of water it might furnish to the inhabitants of said city for certain purposes, and provided that for places of business and for purposes not therein enumerated such water should be supplied to such inhabitants at such annual charge as might be agreed upon according to the quantity of water required. Said charter further vested in said city the right to purchase such water-works property and rights and franchises of your orator after the expiration of twenty

years from the time such water should be brought into said
4 city and be ready for distribution and use in case the General Assembly of Alabama should so authorize the then existing authorities of said municipal corporation, the terms of such purchase and sale to be agreed upon on a valuation to be made by arbitrators appointed by each party respectively. All the duties and obligations imposed upon complainant by its said charter with respect to the then municipal corporation and its inhabitants enured to the benefit of defendant city and to that of its inhabitants and are binding upon your orator as to them, and the option of purchasing orator's said rights and properties, vested by its charter in the then municipal corporation, is now vested in and possessed by said defendant, which will have the right to exercise such option at the arrival of the time designated therefor by said charter, and your orator is bound by and holds its said property and rights, with all improvements it may make thereon, subject to such right of purchase.

Third. In the execution of the purposes of its charter complainant laid mains and pipes in the streets of said city and established hydrants and fire-plugs therein, and about ten or twelve m*l*es outside the city limits it built a large reservoir and erected two large pumps upon Clear creek and laid large mains therefrom to the city, connecting with said reservoir and pumps, the system securing and supplying an abundant supply of pure water to said city and its inhabitants from said Clear creek, which is a stream of water in Mobile county other than and distinct from Three Mile creek. Complainant so constructed said system of water works and brought the water thereof within the limits of the then port of Mobile, and had the same ready for distribution and supply to the inhabitants of said city and to the houses and dwellings within the limits thereof by the first day of July, 1888, and complainant expended in the construction of said system exceeding the sum of seven hundred and fifty thousand dollars.

For the purpose of constructing such system it issued
5 and sold $750.00 of its negotiable bonds, secured by a mortgage on its plant and all of its property, rights, and franchises. Said bonds bear interest at the rate of six per cent. per annum, payable semi-annually, as evidenced by interest coupons on each thereof, and they are now outstanding in the hands of *bona fide* purchasers for value. Orator is dependent upon its income derived from water supplied by it to said city and its inhabitants to pay the interest of said bonds and their principal at maturity, and the expenses of operating its said system, and of maintaining it in condition for efficient use to fulfill its contracts with the city, and to comply with the contract of its charter that it will turn it over to the city in good condition if purchased by said defendant under the terms of such charter.

Fourth. On the 15th day of August, 1888, complainant and the then city of Mobile entered into a contract for the supply of water by it to said municipal corporation and its inhabitants. While such contract was still in force, and on the 14th day of April, 1891,

for the purpose of making certain changes therein and extending the period of operation thereof, orator and said municipal corporation entered into a further written contract for such supply of water by it. Said amended contract is still in force and will not expire until the 1st day of July, 1900. True copies of said contracts are hereto attached, marked respectively "Exhibit A" and "Exhibit B," and are made a part of this bill of complaint. When each of said contracts were made, said municipal corporation was governed by a different charter from that which it now has, but had the same corporate name and lawful authority to make such contracts, and the present municipal corporation is its successor and is in all respects bound by the provisions of said existing amended contract and by all the obligations of its predecessor resulting therefrom. The rates fixed by said contracts for the supply
6 of water to the inhabitants of said city are less than the rates which orator was and is authorized to charge therefor by its charter. The free supply of water for the practice of firemen, as provided by both of said contracts, and for fountains, as stipulated by said amended contract, was not required of orator by its charter.

Fifth. Under the provisions of its charter complainant is bound to keep itself in readiness at all times to furnish all such water as may be required by said city for its public buildings, and as may be required by said county for its jail and court-house, and by the inhabitants of said city for all legitimate purposes. It shows to the court, as a matter of law, that the duties and obligations imposed upon it by its charter of incorporation are of a continuing character, and that by the same it is bound to said municipal corporation and its inhabitants to hold itself in readiness to perform each and all of such duties and obligations until its property and rights shall be purchased by the city under the provisions of orator's charter, or until it shall cease to exist, under the penalty of a forfeiture of its franchise rights upon a failure so to do. Since the completion of the construction of its system in 1888, orator has at all times provided said city and its inhabitants with an abundant supply of wholesome water, and is now doing so. It has in all respects complied with all the obligations imposed upon it by its charter and its aforesaid contracts, and is now in good faith executing all such obligations at great expense to itself and is maintaining its system and plant in proper condition for the continued fulfillment of such duties and obligations, and is ready and willing in all respects to fulfill the same, and for such purpose is using the mains and pipes and other property provided by it as aforesaid.

Sixth. The charter of incorporation of the defendant, the city hereinbefore referred to, contained the following provision: "The general council has also the right to contract for, build or purchase or otherwise acquire public works, subject to the approval of
7 the majority vote of the citizens of Mobile at a special election called therefor."

Acting under such charter authority, the mayor and general council of said city adopted a resolution on the 12th day of July,

1897, calling a special election to be held in said city on the 2nd day of August, 1897, to ascertain whether or not a majority of the citizens of Mobile would by their votes approve of the general council's contracting for, building, purchasing, or otherwise acquiring a system of water works to cost not exceeding $500,000, to be paid for by issuing bonds of said city, said bonds to be secured by a mortgage upon such system. Under said resolution said special election was held, a majority of the citizens of the city of Mobile who voted at such election voted in favor of such proposition, and the same was formally declared to have been carried and approved by said general council.

Prior to the 30th day of November, 1898, said city of Mobile, in further execution of the authority so granted it by its charter and the proceedings so had thereunder, acting through its mayor and general council, adopted resolutions and caused proceedings to be had, other than those above set forth, to acquire and operate a system of water works, and under certain of such proceedings it claimed to have acquired title to and it took possession of a system of water works having its source of supply on Three Mile creek and known as the Stein system. Said Stein system had been engaged in supplying water to some of the inhabitants of Mobile, and immediately upon taking possession thereof, which was prior to the 1st day of June, 1898, said city commenced to operate the same to supply its inhabitants with water in competition with complainant, and has ever since so operated the same, and is now doing so. Such operation of said Stein system by the city is injurious to complainant in that it takes away from it customers that it would otherwise get, and so greatly reduces the income which it would
8 otherwise derive from its business of supplying water to the inhabitants of said city.

The right of said defendant to so acquire, own, and operate said Stein system is being litigated with it by a third party owning an interest in said system, and its right to have its projected water-works system connected with and supplied from said Three Mile creek, as against said third party, has not yet been adjudicated.

And in further execution of such authority and of such resolution and proceedings had thereunder, defendant the city, prior to the 1st day of October, 1898, entered into a contract with certain parties to construct for it a water-works system and to furnish the same with stand pipes, pumping engines, mains, pipes, fire-plugs, valves, hydrants, and other equipments necessary to enable it to supply water to itself and its inhabitants on a large scale, and to connect the same with some convenient water supply, and it agreed to pay said parties exceeding the sum of $450,000 for such construction. Said contract was made conditional upon the city's obtaining authority from the legislature of Alabama to issue and sell its negotiable bonds to obtain the means to pay said contractors the amount so fixed for their compensation.

It procured such act of the legislature of said State, approved on the 30th day of November, 1898, authorizing it to issue and sell its negotiable bonds for $500,000, to raise money to pay for its proposed

system of water works. It has sold said bonds for a small excess of their face value, is now issuing and delivering the same to the purchasers thereof, and is using the proceeds thereof to pay for the construction of said system.

The contractors mentioned are now actively engaged in executing their contract for the construction of said system, and to that end are laying mains and pipes in the streets of said city for use in and as a part of said projected system; such mains and pipes are laid in and along many of the streets of said city in and along
9 which the pipes and mains of complainant's system are laid and used.

Seventh. By a further act, approved November 30th, 1898, the General Assembly of Alabama empowered said defendant, the city, to buy or to build, erect and maintain, and to operate water works for the supply of it and its inhabitants with water for the extinguishment of fires, and for sanitary, domestic, and other purposes, and to that end to make all needful contracts for acquiring a location or locations for reservoirs, stand pipes, pumps, and all other parts of a system of water works, and for all rights of way necessary for the construction of such system, and to use for that purpose any and all of the streets and alleys of said city, and any and all of the public roads of Mobile county. Said act also empowered said city, in case it should be unable to contract for other rights of way, or the land necessary for the location of the stand pipes, reservoirs, pumps, buildings, and all machinery needed in erecting and constructing the water-works system authorized by said act, then, in order to obtain the same and the water supply for its stand pipes, reservoirs, pipes, sluiceways, and canals, to condemn the waters of any stream, creek, or spring or river, and the lands adjacent thereto, and also the lands forming what is known as the water shed, if the same are situated in Mobile county, by the exercise of the right of eminent domain in the manner provided by law for the condemnation of lands for public uses.

By the terms of said act Clear creek and the waters thereof, the source of supply of complainant's water works, are excepted from the operation of such right of condemnation.

Said charter provision and said two acts last set out constitute the only legislative authority which defendant the city has to own and operate a system of water works, and they do not prohibit said defendant from establishing its projected water-works system upon a source of supply other than Three Mile creek, or from using waters other than such last-mentioned stream to supply said city
10 and its inhabitants, except as to Clear creek.

Defendants claim that the grants to the city of Mobile above mentioned authorize it to construct and operate a water-works system for the supply of water to said city or its inhabitants, to be connected with and supplied by either Three Mile creek or by any other stream in Mobile county, except Clear creek, that may be selected by said city. Orator admits that such grants would operate to confer such authority, except as to Eight Mile creek, but for the fact that the same are altogether invalid as hereinafter shown.

It is the intention of said city to use said system when completed for the purpose of supplying itself with water for all its purposes, altogether excluding complainant from supplying it with water, and to enter into active competition with complainant in supplying water to its inhabitants.

Eighth. Said defendant has not yet designated or fixed upon the source of water supply for its proposed system, with which the mains and pipes now being laid in the streets will be connected. It proclaims through its mayor and the members of its general council that its preferred purpose is to make Three Mile creek such source of supply, but that, if prevented from so doing, it will secure a site upon Eight Mile creek, make that stream the source of supply for its projected system, and connect with its plant, and its mains and pipes now being laid, and convey the water of that stream into its limits for supply to itself and its inhabitants for all purposes. Said Eight Mile creek is a stream of water in the county of Mobile other than and distinct from Three Mile creek, but it is a continuation of and the same stream as Clear creek, which said city is prohibited from using as a source of water supply for its projected water-works system by the terms of the act of November 30th, 1898, first hereinbefore set forth, and such use of said Eight Mile creek by said defendant for such purpose is, therefore, prohibited to it by such
11 act. In execution of its alternative or ulterior intention of so constructing its system upon or in connection with Eight Mile creek, said city applied to the probate court of Mobile county, on the 5th day of May, 1898, to condemn certain lands lying on and embracing a part of said last-mentioned stream to its use in the construction of its said proposed system and to supply the water therefor. After commencing such proceedings it discovered that it was then without legislative authority to condemn property outside its limits, and has therefore since dismissed such suit.

But, for the purpose of remedying such want of power and to enable it to construct and operate its said system on and from said Eight Mile creek, said defendant thereupon sought and obtained from the General Assembly of Alabama the passage of the act of November 30th, 1898, hereinbefore mentioned, authorizing it to condemn lands and property outside its limits for use in the construction and operation of its water works.

And it is causing its engineers and surveyors to make surveys, estimates, and reports to it as to the most available site on said Eight Mile creek for the location of its proposed reservoir and source of water supply, the cost of establishing the same there and of connecting it with the mains and pipes now being laid by said defendant in its streets. Defendant Bush, as the mayor of said municipality, has been and is actively engaged in promoting and pushing forward all the acts hereinbefore charged as having been done and now being carried on to establish and operate said projected water-works system of the city, and said acts have been and are being done with the declared intent and purpose on the part of the defendants of establishing said system upon Eight Mile creek and of using its water to supply said city and its inhabitants in

competition with complainant in case it shall find it impracticable to use Three Mile creek for that purpose.

All of the resolutions, proceedings, and acts had and done by defendants in furtherance and execution of their purpose to
12 erect a water-works system for said city upon either Three Mile creek or upon Eight Mile creek, and to use the water of one or the other of said streams through said system to supply said city and its inhabitants with water, have their foundation and authority in the charter of said city and the two acts of the legislature of Alabama approved November 30th, 1898, all hereinbefore set forth, and they have no other source of grant or right.

Orator shows that such declared purpose of defendants and the acts heretofore and now being done by them in execution thereof work to its very great embarrassment and injury. The establishment of the proposed water-works system upon a source of supply guaranteed against such use by the State's contract with complainant hereinbefore set forth, and the use of such system to supply said city and its inhabitants with water in competition with complainant and in violation of the exclusive privilege granted to complainant by its charter, as hereinbefore averred, will deprive it of many of its customers, prevent it from getting others, and destroy its income from its system and the value of its franchise and property.

It will deprive complainant of all means of paying the interest on its bonds and of keeping its system in condition to perform the obligations imposed upon it by its charter.

By the city's bad faith in thus violating the obligation of the charter contract made by the State with the complainant, it will be enabled to purchase orator's system and property under the option conferred upon it by such charter at a greatly reduced valuation.

It will inevitably blot out and practically confiscate the very large capital in good faith invested in orator's system in reliance upon the pledged faith of the State in the grant of its franchise, as stated by this bill of complaint.

Orator shows that, unless restrained by the process of this court, defendants will continue to use and operate said Stein sys-
13 tem, as it is now doing, and to lay mains and pipes in the streets of said city, and to do all the other acts set out in this bill as having been done and now being done by them with the intent and purpose of establishing the projected water-works system of said city upon Three Mile creek or upon Eight Mile creek, and of operating therefrom, and of bringing into said city the water of one of said streams through its projected system, and of supplying it to said city and its inhabitants, as charged in this bill of complaint, and that they will carry out their said purpose and so establish and operate such water-works system.

Ninth. The grant of the exclusive right to supply water to said city of Mobile and its inhabitants for the period and upon the conditions regulating the same made to complainant by the legislature of Alabama in its original and amended charter of incorporation, as hereinbefore set forth, was of great value to it, and it relied upon

the State's respecting and keeping in good faith the obligation of such contract with it. But for such grant and its confidence it being justly protected in it, the hope of a fair remuneration in the future from furnishing water at reasonable rates to the city and its inhabitants which was thereby held out to it, orator would not have been justified in making such a large outlay of money in building its plant and in making such large concessions to the city for free use of water for its hospitals, public fountains, municipal buildings, and other public purposes, and to the county for its court-house and jail, as provided in its charter and in its contracts with the city hereinbefore set out, and it would not have done so.

Tenth. Complainant further shows and charges as a matter of law that by the provision of its charter hereinbefore set forth defendant the city, as an integral part and agency of the State of Alabama, is excluded from establishing its projected water-works system upon Three Mile creek, whether as an assignee of the
14 Stein system and rights or otherwise, and from using said Three Mile creek to supply water to itself and its inhabitants.

And it submits also as a matter of law that each of such grants to it of an exclusive privilege as to all streams other than Three Mile creek, and the exclusion of said city from the use of said last-mentioned stream as a source of supply for its intended system, was a contract thereby made with it by said State that it should continue to possess and enjoy the benefits of such exclusive privilege and such bar of the city until lawfully deprived thereof.

Such grant of an exclusive privilege as to all streams other than Three Mile creek is not within the inhibition of section 23 of article 1 of the constitution of said State, which prohibits the passage of any law making any grants of special privileges or immunities upon the following grounds, among others, viz:

1. It does not create a monopoly, Three Mile creek being excepted from its operation.

2. It is subject to extinguishment by purchase by the city at the time and upon the terms prescribed by complainant's charter, as hereinbefore set forth.

3. It is subject to the power of the General Assembly to alter, revoke, or amend it whenever in their opinion it may be injurious to the citizens of the State, "in such manner, however, that no injustice shall be done to the corporators," as provided by section 10 of article 14 of said constitution.

Each of said contracts was and is binding upon the State so long as existing, and its obligations while existing cannot be impaired by the State, or by defendants acting under authority granted by the State, without violation of the constitutional provision of the United States that no State shall pass any law impairing the obligation of contracts.

15 Eleventh. No proceedings have been taken by the State to forfeit complainant's charter, and it is still lawfully entitled to all the benefits of all rights and franchises thereby conferred upon it.

The General Assembly of Alabama has not altered, revoked, or

amended the charter grant to complainant of the exclusive privilege hereinbefore set forth or of the exclusion of the city from the use of Three Mile creek as a source of water supply for its proposed water-works system, unless the provisions of the charter to defendant the city and of the two acts of the legislature of the State approved November 30th, 1898, which are hereinbefore fully set forth, work such revocation.

No provision is made in said charter or in either one of said acts to prevent injustice being done by such revocation to complainant's corporators or to compensate them or complainant for the great damage thereby done them and it.

By the provisions of section 10 of article 14 of the constitution of said State the power of the General Assembly to alter, revoke, or amend any charter of incorporation is expressly limited to exercise in such manner that no injustice shall be done to the corporators.

The charter of said city and the said two acts of November 30th, 1898, wholly failing to observe such constitutional direction, are ineffectual and void as laws to revoke or affect complainant's said exclusive privilege or the exclusion of the city from Three Mile creek, and in their attempt to do so are laws impairing the obligation of the State's original contract with complainant that it should enjoy such exclusive privilege to the extent, for the time, and upon the terms stipulated by its charter, as stated in this bill of complaint, and that said city should be barred from using the water of Three Mile creek for the supply of its proposed system.

Twelfth. Orator shows that said defendant the city has no
16 property subject to execution or from which complainant can have by suit at law satisfaction for the damages already sustained and which will hereafter be suffered by it from the city's violation of orator's chartered rights, as set forth by this bill of complaint, and that orator has no adequate remedy at law in the premises, and it will suffer irreparable loss and injury unless is shall be protected by the interposition of this honorable court in granting it proper relief in the premises.

Prayer for Relief.

Wherefore, the premises considered, your orator prays your honor to take jurisdiction of the subject-matter of this bill and to enjoin and restrain said defendants from building or operating any system of water works for defendant The City of Mobile connecting with or having for its source of supply of water either Three Mile creek or any stream in said Mobile county other than Three Mile creek during the period of time that complainant's charter grants to it the exclusive right and privilege of conducting and bringing water from any source other then Three Mile creek, in the county of Mobile, for the supply of said city of Mobile—that is to say, for twenty years from the time when complainant's water was brought into the corporate limits of the port of Mobile and was ready for distribution, which was the 1st day of July, 1888, and till the municipal author-

ities of said city shall purchase the water works and property of orator, as provided by its charter.

And that the defendants be restrained and enjoined from now using and operating said Stein system for said defendant, The City of Mobile, to supply its inhabitants with water.

And that the court will grant to complainant such other and further or other and different relief as the nature of its case may require and as in equity and good conscience it ought to have.

17 *Prayer for Process.*

Orator further prays that the defendants, The City of Mobile and John Curtis Bush, in his official capacity of mayor of said city, be made parties defendant to this bill of complaint, and that the usual writ of subpœna issue out of this court to each of said defendants, commanding them and each of them to appear in this honorable court and demur to or plead to or answer this bill of complaint, as required by the rules of this court, within the time and under the penalties prescribed by law.

BESTOR & GRAY,
R. H. CLARKE,
Solicitors for Complainant.

FOOT-NOTE.—Each of the defendants is required to answer under oath each and all of the paragraphs of this bill from 1 to 12, both inclusive.

BESTOR & GRAY,
R. H. CLARKE,
Solicitors for Complainant.

STATE OF ALABAMA, }
County of Mobile. }

Personally came before me, William J. Young, a notary public in and for the State and county aforesaid, Walter Wood, the treasurer of The Bienville Water Supply Company, the complainant in the foregoing bill of complaint, who, being by me duly affirmed, deposes and says that he has read said bill of complaint and knows the contents thereof, and that the matters and things therein stated as facts are true, and that he is authorized to make this affidavit.

WALTER WOOD.

Subscribed and affirmed to before me on this 11th day of February, A. D. 1899.

WILLIAM J. YOUNG,
Notary Public, Mobile County, Alabama.

18 EXHIBIT "A."

This agreement made and entered into this 15th day of August, in the year 1888, by and between the Bienville Water Supply Company, a corporation chartered by and existing under the laws of the State of Alabama, and the city of Mobile, witnesseth:

1. Said Bienville Water Supply Company agrees and contracts to furnish for the use of the city of Mobile two hundred and sixty (260) double-nozzle fire-hydrants, said hydrants to be of the Ludlow or Mathews pattern, to be maintained, kept in repair and replaced when necessary without additional cost to the said city, and to be located as per map now on file in the office of the Bienville Water Supply Company in the city of Mobile, a copy of which is filed with the city clerk; the city of Mobile being hereby accorded the right to discontinue the use of ten hydrants each year, for a period of three years, on mains as now laid, until the discontinuance of thirty (30) hydrants is affected, and the said water supply company agrees to furnish in place of said thirty discontinued hydrants and as rapidly as they may be discontinued, not exceeding ten (10) in any one year, other hydrants in their places to be located as the general council may determine, either upon mains already in existence or upon mains to be laid without additional cost to the said city, provided such additional mains shall not exceed five hundred feet to any one hydrant, and provided also, this is not to interfere with the city's rights under section five of this contract for hydrants in addition to the 260 upon the conditions named in said section five (5).

2. Said Bienville Water Supply Company further agrees to erect or cause to be erected in some suitable place to be agreed upon by the general council of said city, a guage which shall indicate an average pressure of eighty (80) pounds at the hydrant for every twenty-four hours, failure to maintain such pressure shall abate the price proportionately for the time such failure continues after the expiration of such 24 hours. In addition said water company agrees and guarantees to furnish for fire service during the existence of any fire or conflagration at any time within the city within reach of hydrants through three hundred (300) feet of two and one-half-inch (2½) double leads of hose with one-inch nozzle, six vertical streams of eighty feet each; through same hose with one and one-quarter (1¼) inch nozzle six vertical streams sixty feet each. For failure to render this service at any time during such fires or conflagrations said water supply company hereby agrees to forfeit to the said city the sum of one thousand dollars and that thereupon this contract shall immediately cease and terminate; provided, however, that said company shall not be subject to such forfeiture or termination of this contract if by reason of any illegal, unlawful, or improper interference by parties other than said company with the pipes, mains, hydrants, or machinery of said water supply company, it shall be unable to render service. It is further agreed that should said water company by reason of any accident to its pipes, mains or machinery, not the result of negligence on the part of said company, its officers, agents, or employees become unable to render the service contracted for, then said company upon notice to the city authorities, shall have a reasonable time to be agreed upon between said company and said city, in which to make necessary repairs, in which event said water supply company shall abate proportionately the amount agreed upon to be paid under this contract.

3. Said Bienville Water Supply Company further agrees that said city shall have the unrestricted use of said hydrants for fire purposes as well as for the practice of firemen; the free use of water for flushing the gutters of said city, provided, that not more than two hydrants are to be used at any one time, and then only during daylight and these *for this purpose not during a fire*; also the free use of water for all municipal buildings, as well as for a fountain in Bienville square, said water to said fountain to be through a one-inch pipe and only to be used during daylight and not on rainy days.

4. Said water supply company further agrees and binds itself not to charge during the continuation of this contract, for domestic uses a greater or higher rate of water than that now established, a schedule of which is herein incorporated and made a part of this agreement, to wit:

Private Families.

One service	$10.00
Each additional faucet or sink	5.00
Bath-tub	5.00
Stationary wash-tub	1.50
19 Butler's sinks each	2.00
Kitchen sinks	5.00
Stationary wash-basins	1.00
Automatic pan water-closet	4.00
Hopper water-closet	6.00
Hose sprinkler for lawns and streets, nozzle not to exceed ($\frac{3}{8}$") three-eighths of an inch	10.00
Revolving lawn sprinkler, $\frac{1}{16}$" openings, 6 hours per day	10.00
Fountains $\frac{1}{8}$" jet, 6 hours each day, for each month	1.00

Larger fountains, special rates.

Hot or cold water flowing into one vessel will be charged as one tap only.

Apartments and tenement-houses, each flat or suite of rooms charged as one dwelling.

Hotels and Boarding-houses.

Each faucet and sink	12.00
Each bed-room	1.00
Hopper water-closet	20.00
Bath-tub	12.00
Automatic pan water-closet	12.00
Automatic urinal	5.00

Private Stables.

Each horse, including washing vehicles by hand	3.00
Each cow	2.00
Stable hose	5.00

Livery, Public, and Boarding Stables.

Each stall	1.50
Hose for washing, ⅛ nozzle	30.00

Miscellaneous.

Tapping, including pipe and curb-work	8.00
Banks and offices, one basin	5.00
Bakeries, each 300 barrels of flour or fraction	5.00
Barber shops, each chair	3.00
Boilers, per meter, per 1,000 gallons	.50
Drug stores, each prescription clerk	12.00
Offices and sleeping-rooms	5.00
Bars, each bartender	12.00
Sprinkling streets, per cart, per month	20.00
Builders, each barrel of lime or cement	.05
Meter rates, per 1,000 gallons	.50
Elevators, freight, per annum	300.00
Elevators, passengers, per annum	500.00

5. Said water supply company further agrees to furnish, erect, and maintain for the use of the said city any number of additional fire-hydrants the city of Mobile may require during the continuance of said contract at the same rate per hydrant as agreed upon for the said 260 hydrants, provided said water supply company shall not be required to lay more than 500 feet of pipe in order to place or erect any one additional hydrant.

6. The said water supply company hereby agrees to erect and furnish for the use of the said city of Mobile the full complement of hydrants (260) within 60 days from the date hereof.

In consideration of the above-recited premises and the undertakings and stipulations therein of the Bienville Water Supply Company, the city of Mobile hereby contracts with the said water supply company for the use of two hundred and sixty (260) double-nozzle fire-hydrants, and agrees to pay said water supply company for the use of said hydrants at the rate of $50.00 a hydrant per annum, during the continuance of this contract. It is mutually agreed that said contract shall be for a period of six years, the payments to be made thereunder to be monthly on or before the 10th day of each month, the city reserving the right to withhold one month's full pay during the continuance and until the termination of this agreement. It is mutually agreed that this contract shall take effect as of the first day of July, 1888, as to hydrants already erected and that the use of the additional hydrants of the full complement (260) to be erected, shall be paid for from the 1st day of each month after they are put down and ready for service.

It is further understood that the use of hydrants under private contract are not to be paid for by the city.

20 The city of Mobile further agrees in satisfaction and settlement of the claim of the Bienville Water Supply Company for water consumed previous to the 1st day of July, 1888, to pay

the sum of $500.00 the same to be paid on the execution of this contract.

In case at any time the said Bienville Water Supply Company shall fail or refuse to comply with the terms of this contract according to its true intent and meaning as to any one or more things herein provided and agreed to be done and performed on its part and shall so remain in default for the space of ten days without any satisfactory reason upon its part, then it shall and may be lawful and proper on the part of the corporate authorities of the city of Mobile to declare this contract rescinded and wholly abandon the same upon giving notice thereof to the said Bienville Water Supply Company, always provided however, that the said corporate authorities of the city of Mobile, shall on their part have fully paid, performed and fulfilled all things and everything on their part which up to that period of time has been or may be required to be paid, performed, and fulfilled on the part of the said city to or towards the said Bienville Water Supply Company.

In testimony whereof, the Bienville Water Supply Company, has caused its president to sign his name hereto and has also caused its corporate seal to be attached, and the said city of Mobile has caused the mayor thereof to sign his name hereto, and has caused its corporate seal to be hereto attached, both in duplicate, this 14th day of August, A. D. 1888.

THE BIENVILLE WATER SUPPLY COMPANY,
By GEORGE A. KETCHUM, *President.*
THE CITY OF MOBILE,
By JOSEPH C. RICH, *Mayor.*

Attest: JNO. F. SUMMERSELL, *City Clerk.*

EXHIBIT "B."

This agreement made and entered into on this 14th day of April, in the year of our Lord, one thousand eight hundred and ninety-one, by and between the Bienville Water Supply Company, a corporation chartered by and existing under the laws of the State of Alabama, on of the one part, and the city of Mobile, on the other part, and having for its object the extension and change of the contract heretofore entered into between said parties dated the 14th day of August, A. D. 1888, as hereinafter provided, witnesseth:

Third. That said Bienville Water Supply Company further agrees that said city shall have the unrestricted use of said hydrants for fire purposes as well as for the practice of firemen, and the free use of water for flushing the gutters of said city, and also any sewers that may be constructed, provided, however that the opening, closing, and use of said hydrants for flushing said gutters and sewers shall be under the direct supervision and direction of the chief of the fire department of said city, and provided, further, that not more than two hydrants shall be used at any one time for flushing, and then only during daylight, but that said hydrants are not to be

used at any time during a fire; also the free use of water for all municipal buildings, for one fountain in Bienville square, one fountain in Washington square, and two fountains on Government street. These fountains on Government street and in Washington square are to have only three-sixteenth ($_{1}^{3}_{6}$) inch jets. The water pipe from said supply company's main to the fountain in the Bienville square shall be one inch in diameter, and the pipes to the other fountains are not to be larger than three-quarters ($\frac{3}{4}$) of an inch in diameter. The water for said fountains *are* only to be used during daylight, but is not to be used on rainy days.

Fourth. Said water supply company further agrees and binds itself not to charge during the continuance of this contract, for domestic uses, a greater or higher rate for water than that now established, a schedule of which is herein incorporated and made a part of this agreement, to wit:

Private Families.

	One service	$10.00
	Each additional faucet or sink	5.00
	Bath-tub	5.00
21	Stationary wash-tub (each)	1.50
	Butler's sink	2.00
	Kit*c*hen sink	5.00
	Stationary wash-basins	1.00
	Automatic pan water-closet	4.00
	Hopper water-closet	6.00
	Hose sprinkler for lawns and streets, nozzle not to exceed four-sixteenths ($_{1}^{4}_{6}$) or one-quarter $\frac{1}{4}$ of an inch	10.00
	Revolving lawn-sprinkler, one-sixteenth ($_{1}^{1}_{6}$) inch opening, eight hours per day	10.00
	Fountains, one-eighth ($\frac{1}{8}$) inch jet, six (6) hours each day for each month	1.00

Larger fountains, special rates.

Hot or cold water flowing into one vessel will be charged as one tap only.

Apartments and tenements-houses, each flat or suite of rooms charged as one dwelling.

Hotels and Boarding-houses.

Each faucet and sink	$12.00
Each bed-room	1.00
Hopper water-closet	20.00
Bath-tub	12.00
Automatic pan water-closet	12.00
Automatic urinal	5.00

Private Stables.

Each horse, including washing vehicles by hand	3.00
Each cow	2.00
Stable hose	5.00

Livery, Public, and Boarding Stables.

Each stall	1.50
Hose for washing, one-eighth (⅛) nozzle	30.00

Miscellaneous.

Tapping, including pipe and curb work	8.00
Banks and offices, one basin	5.00
Bakeries, each three hundred (300) bbls. flour or fraction	5.00
Barber shops, each chair	3.00
Boilers, per meter per 1,000 gallons	.50
Drug stores each prescription clerk	12.00
Offices and sleeping-rooms	5.00
Bars, each bartender	12.00
Sprinkling streets per cart, per month	20.00
Builders each barrel of lime or cement	.05
Meter rates per 1,000 gallons	.50
Elevators, freight per annum	300 00
Elevators, passenger, per annum	500.00

22 Sixth. In consideration of the above-recited premises and the undertakings and stipulations therein of the Bienville Water Supply Company, the city of Mobile hereby contracts with the said water supply company for the use of two hundred and sixty (260) double-nozzle fire-hydrants, and agrees to pay said water supply company for the use of said hydrants at the rate of fifty ($50.00) dollars a hydrant per annum during the continuance of this contract. It is mutually agreed that said contract shall be and extend for a period of twelve (12) years from the first day of July, 1888, the payments to be made thereunder to be monthly on or before the 10th of the month, the city reserving the right to withhold one month's full pay during the continuance and until the termination of this agreement. It is further understood that the use of hydrants under private hydrants are not to be paid for by the city. In case at any time the said Bienville Water Supply Company shall fail or refuse to comply with the terms of this contract, according to its true intent and meaning as to any one or more things herein provided, and agreed to be done and performed on its part and shall so remain in default for the space of ten (10) days without any satisfactory reason upon its part, then it shall and may be lawful and proper on the part of the corporate authorities of the city of Mobile to declare this contract rescinded and wholly to abandon the same upon giving notice thereof to the said Bienville Water Supply Company of its intent so to do always, provided, however, that the said corporate authorities of the city of Mobile, shall, on their part, have fully paid, performed, and fulfilled all things and everything on their part which up to that period of time has been or may be required to be paid, performed, or fulfilled on the part of the said city of Mobile to or towards the said Bienville Water Supply Company.

Seventh. It is agreed between the parties hereto that the provisions of sections one (1), two (2), and five (5), as contained in said

original contract of August 15th, 1888, are to be in no manner *to be* affected by this instrument, except in so far that they are hereby continued in full force until the end of said contract as extended by this contract, but that sections three (3), four (4), and six, as herein written are to be substituted therefor and are to be binding on said parties until the expiration of said contract as extended by this contract.

In testimony whereof the Bienville Water Supply Company has caused its president to sign his name hereto and also caused its corporate seal to be attached, and the said city of Mobile has caused the mayor thereof to sign his name hereto, and has also caused its corporate seal to be hereto attached, both in duplicate, on the day and date first above written.

BIENVILLE WATER SUPPLY COMPANY,
By GEORGE A. KETCHUM, *President.*
THE CITY OF MOBILE,
By JOSEPH C. RICH, *Mayor.*

Attest: JNO. F. SUMMERSELL, *City Clerk.*

Endorsed: No. 209. In equity. U. S. circuit court, southern district Alabama. Bienville Water Supply Company *versus* The City of Mobile *et al.* Original bill of complaint and exhibits thereto. Filed this the 21st day of February, A. D. 1899. Richard Jones, clerk.

23 *Subpœna in Equity.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama, at Mobile.

THE BIENVILLE WATER SUPPLY COMPANY, a Corporation Chartered by the General Assembly of the State of Alabama, Complainant,
vs.
THE CITY OF MOBILE, a Municipal Corporation, and John Curtis Bush, as Mayor Thereof, Defendants.
} In Equity. No. 209.

The President of the United States of America to The City of Mobile, a municipal corporation, and John Curtis Bush, as mayor thereof, who are citizens of the district aforesaid and of the State of Alabama, Greeting:

You and each of you are hereby commanded and strictly enjoined that, laying all other matters aside and notwithstanding any other excuse, you and each of you personally be and appear before the judge of the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, at Mobile, at the clerk's office of the said court, in the city of Mobile, at rules, to be had

on the first Monday of April, 1899 (being the 3rd day of said month), next, to plead to, answer, or demur to a bill of complaint exhibited against you in the said court by the Bienville Water Supply Company, a corporation chartered by the General Assembly of the State of Alabama, who is a citizen of the State of Alabama, and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit, and have there then this writ.

To the marshal of the United States for the said district to execute.

Witness Honorable Melvil'e W. Fuller, Chief Justice of the United States, and the seal of said circuit court, at Mobile,
21 this 21st day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Court.]

Attest: RICHARD JONES, *Clerk, &c.*

NOTE.—The defendants are required and hereby notified to enter appearance in the above-entitled cause in the clerk's office of said court, in the custom-house building, in the city of Mobile, on or before the rule day next ensuing, to wit, the first Monday of April, anno Domini 1899, or the bill may be taken *pro confesso* against them.

RICHARD JONES, *Clerk, &c.*

BESTOR & GRAY &
R. H. CLARKE,
Complainant's Solicitors.

Marshal's Return.

Received in office this 21st day of February, A. D. 1899, and executed by serving copies of the within subpœna on the City of Mobile by handing the same to R. B. Owen, Jr., clerk of the city of Mobile, and on J. C. Bush, mayor of the city of Mobile, by handing him a copy, on this 22nd day of February, A. D. 1899.

FRANK SIMMONS,
United States Marshal,
By C. D. HENDERSON, *Deputy.*

Returned and filed this 22nd day of February, 1899.

RICHARD JONES, *Clerk.*

Answer of Defendants and Exhibits.

In the Circuit Court of the United States, Fifth Judicial Circuit, Southern District of Alabama.

THE BIENVILLE WATER SUPPLY COMPANY, Complainant,
vs.
THE CITY OF MOBILE and JOHN CURTIS BUSH, as Mayor of the City of Mobile, Defendants.
} In Equity. No. 209.

The joint and several answers of The City of Mobile and
25 John Curtis Bush, as mayor of the city of Mobile, to the bill of complaint of The Bienville Water Supply Company, complainant.

These defendants respectively, now and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to *such* much thereof as these defendants are advised it is material or necessary for them to answer, answering, say:

First.

As to the first paragraph of the bill of complaint, defendants admit that the matters and things stated therein are true, as therein stated, except that the amended charter of said Bienville Water Supply Company is not in substance and in law as stated in said first paragraph of the bill of complaint, because said act amending the original charter of the Bienville Water Supply Company, entitled "An act to amend sections 1, 5, and 11 of an act to incorporate the Bienville Water Supply Company, approved February 19th, 1883," approved February 14th, 1885, and which is referred to in said paragraph one of the bill of complaint, as part of the existing charter of the Bienville Water Supply Company, so far as is set out in said paragraph one of said bill of complaint, is not true and does not *not* truly set forth that part of the existing charter of the Bienville Water Supply Company, because defendants say that said act last named, and being the act referred to in said paragraph one of the bill of complaint as the act approved February 14th, 1885 (Acts of Alabama, 1884–'5, pages 489–'91,) was amended by the General Assembly of Alabama by the passage and approval by the governor of Alabama of the following act:

(Local Acts of Alabama, 1898–'9, page 1689.)

"An act entitled An act to amend an act entitled 'An act to
"amend sections one, five, and eleven of an act to incor-
26 "porate the Bienville Water Supply Company, approved
"February 19th, 1883.'

"SECTION 1. Be it enacted by the General Assembly of Alabama, "That the eleventh section of the charter or act of incorporation of "the Bienville Water Supply Company, as the same appears in the "third section of an act entitled 'An act to amend sections one, "five and eleven of an act to incorporate the Bienville Water Sup-"ply Company, approved February 19th, 1883' and which amend-"atory act was approved February 14th, 1885, (Acts of Alabama, "1884–'5, pages 489–'91), be amended so as to read as follows:

"That said corporation shall have and enjoy the right of con-"ducting and bringing water from any point, other than Three "Mile creek in the county of Mobile, for the supply of said port of "Mobile and village of Whistler, for the period of twenty years "from the time when said water shall have been brought within "the limits of the said port of Mobile, and be ready for distribu-"tion, and supply to the inhabitants of the port of Mobile, and the "houses and dwellings within the limits of said port. And till the "municipal authorities of said port and village, is so by law au-"thorized, shall purchase the water works and property of said "corporation as hereinafter provided, but said corporation within "four years from the date of the passage of this act must begin its "works, and within six years from the date of the passage of this "act, must cause water to be conducted into the port of Mobile, "from some stream, point or place, as hereinbefore named. In "making contracts for labor and materials in the construction of "works, by this act authorized, said corporation, by its directors, "are hereby empowered to stipulate for payment in whole or in "part, by the issue of shares of capital stock of said corporation to "said contractors, but in no event shall the issue of certificates of "capital stock exceed the amount of capital hereinbefore author-"ized."

Approved February 23rd, 1899.

Second.

Defendants admit that the matters and things stated in paragraph two of said bill of complaint are true, as therein stated.

Third.

Defendants say that while complainant did lay mains and pipes in the streets of said city, and did establish hydrants and fire-plugs in said city, and did about twelve miles outside of the city limits build a large reservoir and erect two large pumps upon Clear creek and laid large mains therefrom to the city connecting with said reservoir and pumps, as alleged in the third paragraph of the bill of complaint, defendants nevertheless deny that said water-works system

gave an abundant supply of pure water to said city and its inhabitants.

Defendants say that there are nearly ninety-nine miles of streets within the city of Mobile, and quite or fully eighty-nine or ninety miles of streets upon which are erected houses and dwellings
27 in which reside inhabitants of the city of Mobile; and defendants, further answering, say and charge the fact to be that said Bienville Water Supply Company has not laid its water mains and pipes in more than thirty-three miles out of the total of ninety miles of streets of said city, and upon which there exists houses and dwellings in which reside a portion of the inhabitants of the city of Mobile. Defendants, further answering, allege and charge the fact to be that said water supply company has neglected and refused to extend its said water mains and pipes to supply water to inhabitants of said city residing in houses abutting the public highways or streets of the city of Mobile near to, adjacent, or contiguous to its water mains and pipes as laid in some of the streets of said city of Mobile. Defendants admit that Clear creek is a stream of water in Mobile county other than and distinct from Three Mile creek, as stated in paragraph three of the bill of complaint.

Defendants, further answering said paragraph three of the bill of complaint, deny that said water supply company brought water within the limits of the port of Mobile and had the same ready for distribution and supply to the inhabitants of said city and to the houses and dwellings within the limits thereof by the first day of July, 1888, because defendants say that it has never up to the date of filing this answer had the water ready for distribution and supply, except to a portion of the inhabitants of said city.

Further answering, defendants say that upon many of the streets of said city, amounting to miles and miles of streets, there is no protection against fire, owing to the fact that said water supply company has not laid its mains on those streets, and hence could not erect fire hydrants or plugs thereon. Defendants have no knowledge and can neither admit or deny whether complainant expended in the construction of its water-works system exceeding the sum of seven hundred and fifty thousand dollars, or whether it issued and sold seven hundred and fifty thousand dollars of its negotiable bonds, secured by a mortgage on its plant and all of its property, rights, and franchises, or whether said bonds bear interest at the rate of six per cent. per annum, payable semi-annually, as evidenced by interest coupons on each thereof, or whether said bonds
28 are now outstanding in the hands of *bona fide* purchasers for value. Defendants admit that said water company is dependent upon its income derived from water supplied by it to the city of Mobile and its inhabitants to pay the expenses of operating its system and of maintaining it in condition for efficient use to fulfill its contracts with the city.

Fourth.

Defendants admit the matters and things stated in paragraph four of said bill of complaint to be true, as therein stated.

Fifth.

Defendants admit that the following quoted allegations of paragraph five of the bill of complaint are true, viz:

"Under the provisions of its charter, complainant is bound to "keep itself in readiness at all times to furnish all such water as "may be required by said city for its public buildings, and as may "be required by said county for its jail and the court-house, and by "the inhabitants of said city for all legitimate purposes. It shows "to the court, as a matter of law, that the duties and obligations "imposed upon it by its charter of incorporation are of a continu-"ing character, and that by the same it is bound to said municipal "corporation and its inhabitants to hold itself in readiness to per-"form each and all of such duties and obligations until its property "and rights shall be purchased by the city under the provisions of "orator's charter, or until it shall cease to exist, under the penalty of "a forfeiture of its franchise rights upon a failure so to do."

Defendants deny that since the completion of the construction of its water-works system in 1888 the complainant has at all times provided said city and its inhabitants with an abundant supply of wholesome water, and is now doing so; deny that said water company has in all respects complied with all the obligations imposed upon it by its charter and its aforesaid contracts, and is now in good faith executing all such obligations at great expense to itself and is maintaining its system and plant in proper condition for the continued fulfillment of such duties and obligations, and is ready and willing in all respects to fulfill the same, and for such purpose is using the mains and pipes and other property provided by it as aforesaid.

Sixth.

29 Defendants admit that under the existing charter of the city of Mobile, section 21, that said city, through its general council, had the right to contract for, build, or purchase, or otherwise acquire public works, subject to the approval of the majority vote of the citizens of Mobile at a special election called therefor.

Defendants further admit that "acting under such authority the "mayor and general council of said city adopted a resolution on the "12th day of July, 1897, calling a special election to be held in said "city on the 2nd day of August, 1897, to ascertain whether or not a "majority of the citizens of Mobile would by their votes approve of "the general council's contracting for, building, purchasing, or "otherwise acquiring a system of water works to cost not exceeding "$500,000, to be paid for by issuing bonds of said city, said bonds "to be secured by a mortgage upon such system. Under said reso-"lution said special election was held, a majority of the citizens of "the city of Mobile who voted at such election voted in favor of "such proposition, and the same was formally declared to have been "carried and approved by said general council."

"Prior to the 30th day of November, 1898, said city of Mobile, in "further execution of the authority so granted it by its charter and

"the proceedings so had thereunder, acting through its mayor and "general council, adopted resolutions and caused proceedings to be "had other than those above set forth to acquire and operate a "system of water works, and under certain of such proceedings "it claimed to have acquired title to and took possession of a sys- "tem of water works having its source of supply on Three Mile "creek and known as the Stein system. Said Stein system had "been engaged in supplying water to some of the inhabitants of "Mobile, and immediately upon taking possession thereof, which "was prior to the first day of June, 1898, said city commenced to "operate the same to supply its inhabitants with water."

Defendants deny that its said business of supplying water to certain of its inhabitants by the Stein system can in any just sense be termed competition with the business of complainant, owing to the fact that said system is in such imperfect condition and its facilities are so antiquated and crude and so ill adapted to the present needs of the inhabitants of the city of Mobile that it cannot compete in its present condition with said Bienville Water Supply Company, and that it has taken away from said company customers that it would otherwise get, and so greatly reduces the income which it would otherwise derive from its business of supplying water to the inhabitants of said city.

Defendants admit that the right of said city of Mobile to so acquire, own, and operate said Stein system is being litigated with it by a third party owning an interest in said system, and its right to have its projected water-works system connected with and supplied from said Three Mile creek, as against said third party, has not yet been finally adjudicated.

Defendants, further answering, admit that in further execution of such authority and of such resolution and proceedings had thereunder, the defendant The City of Mobile, prior to the first day of October, 1898, entered into a contract with Messrs. M. T. Lewman and Company, of Louisville, Ky., to construct for it and to furnish the same with stand pipes, pumping engines, mains, pipes, fire-plugs, valves, hydrants, and other equipment necessary to enable it to supply water to itself and its inhabitants on a large scale, and to connect the same with some convenient water supply, and said city agreed to pay Messrs. M. T. Lewman and Company exceeding the sum of $450,000 for such construction. Said contract was made conditional upon the city of Mobile obtaining authority from the General Assembly of Alabama to issue and sell its negotiable bonds to obtain the means to pay said contractors the amount so fixed for their compensation. This said contract between the city of Mobile and Messrs. M. T. Lewman and Company for the construction of its water-works system was and is dated September 20th, 1898; a copy of the same is hereto attached and asked to be made a part of this answer, and is marked "Exhibit A."

Defendants admit that under the terms of an act entitled "An act to authorize the city of Mobile to make and issue bonds for building, purchasing, or otherwise acquiring systems of water works and sewerage for the said city, and to mortgage said works to secure said

bonds," approved November 30th, 1898, and which said act is made a part of this answer, the same being hereto annexed and marked "Exhibit B," the said city of Mobile was authorized to issue and sell its negotiable bonds in the sum of five hundred thousand dollars, to raise money to pay for its proposed system of water works. Defendants admit that it has sold said bonds for a small excess of their face value. The said bonds authorized to be issued to build said systems of water works and sewerage were limited to the amount of seven hundred and fifty thousand dollars, under

31 and by virtue of the terms of said act above referred to, approved November 30th, 1898, and made "Exhibit B," and also under the terms of an act of the General Assembly of Alabama entitled "An act to authorize the city of Mobile to provide, maintain, and operate systems of water works and sewerage," approved November 30th, 1898, asked to be made and taken as a part of this answer, the same being hereto attached and marked "Exhibit C."

Defendants, further answering, say that it, said city, sold said bonds, being seven hundred and fifty bonds of one thousand dollars each, bearing four and one-half per cent. interest, to Messrs. Sperry, Jones and Company, of Baltimore, Maryland, for the sum of seven hundred and fifty-four thousand two hundred and twenty-two dollars and fifty cents ($754,222.50), which said contract between the city of Mobile and Sperry, Jones and Company for the purchase of said bonds is dated September 20th, 1898, and is made a part of this answer and marked "Exhibit D."

Defendants admit that said city of Mobile has issued and delivered to Messrs. Sperry, Jones and Company one hundred and seventy bonds of one thousand dollars each under the terms of said contract and under the authority of said act of the General Assembly of Alabama authorizing it to issue said bonds.

Defendants admit that said city of Mobile is using the proceeds of the sale of said bonds to pay for the construction of said systems of water works and sewerage, which are now being rapidly pushed to completion in said city of Mobile. Defendants, further answering, say that it is true, as stated in paragraph six of the bill of complaint, that the contractors mentioned (Messrs. M. T. Lewman and Co.) are now actively engaged in executing their contract for the construction of said system, and to that end are laying mains and pipes in the streets of said city for use in and as a part of said projected system; such mains and pipes are laid in and along many of the streets of said city in and along which the pipes and mains of complainant's system are laid and used.

32 Defendants, further answering, say that up to the date of the filing of this suit against them Messrs. M. T. Lewman and Company have actually laid exceeding eleven miles of water pipe in and along the streets of said city of Mobile, and had already distributed thousand upon thousands of dollars' worth of material along the streets of said city ready to be placed in the ground as a part of said water-works system, consisting of large and small water mains and pipes, fire-hydrants, valves, specials, etc.

Defendants, further answering, say that to carry into effect the

power conferred upon the city of Mobile to build and construct systems of water works and sewerage under the terms of said several acts of the General Assembly of Alabama approved November 30th, 1898, and made a part of this answer, the general council of said city of Mobile adopted an ordinance on December 6th, 1898, and which ordinance was approved by the mayor of the city of Mobile on December 6th, 1898, entitled "An ordinance to authorize and provide for the issuance of bonds by the city of Mobile for the purpose of acquiring systems of water works and sewerage," a copy of which said ordinance is hereto attached and asked to be had and taken as a part of this answer, the same being marked "Exhibit E." Said ordinance provided for the form of the bond, what its recitals should contain, how it should be executed, and also embraced and included the form of the mortgage to be executed by and between the city of Mobile and the Mercantile Trust and Deposit Company of Baltimore, Md., a corporation, as trustee. An exact copy of this mortgage is set out in the ordinance made a part of this answer as "Exhibit E." Said mortgage was duly executed by the city of Mobile, and said trust company executed the same in signification of its acceptance of the trust therein created, and the same was filed for record in the probate court of Mobile county, State of Alabama, on January —, A. D. 1899.

Seventh.

Defendants, answering the seventh paragraph of the bill of
33 complaint, admit that "by a further act, approved November "30th, 1898 (being the act of the General Assembly of Ala- "bama made a part of this answer as Exhibit C), the General "Assembly of Alabama empowered said defendant, the city, to buy "or to build, erect, and maintain, and to operate water works for "the supply of its inhabitants with water for the extinguishment of "fires, and for sanitary, domestic, and other purposes, and to that "end to make all needful contracts for acquiring a location or loca- "tions for reservoirs, stand pipes, pumps, and all other parts of a "system of water works, and for all rights of way necessary for the "construction of such system, and to be used for that purpose, any "and all of the streets and alleys of said city, and any and all of "the public roads of Mobile county. Said act also empowered said "city, in case it should be unable to contract for other rights of "way, or the land necessary for the location of stand pipes, reser- "voirs, pumps, buildings, and all machinery needed in erecting "and constructing the water-works system authorized by said act, "then in order to obtain the same and the water supply for its "stand pipes, reservoirs, pipes, sluiceways, and canals, to condemn "the waters of any stream, creek, or spring or river, and the lands "adjacent thereto, and also the lands forming what is known as the "water shed, if the same are situated in Mobile county, by the exer- "cise of the right of eminent domain in the manner provided by "law for the condemnation of lands for public uses."

"By the terms of said act, Clear creek and the waters thereof,

"the source of supply of complainant's system of water works, are "excepted from the operation of such right of condemnation."

Defendants specially and expressly deny that the two acts referred to by complainant and being the acts approved November 30th, 1898, one of which authorizes the city of Mobile to provide, maintain, and operate systems of water works and sewerage, and the other authorizes the city of Mobile to make and issue bonds for building, purchasing, or otherwise acquiring systems of water works and sewerage for said city, and to mortgage said works to secure said bonds, constitute the only legislative authority which the defendant the city has to own and operate a system of water works, as charged in paragraph seven of said bill of complaint. Defendant the city denies that it is prohibited from using Three Mile creek or the waters of said creek as a source of supply for the system of water works now in course of active construction by said city of Mobile through its contractors, Messrs. M. T. Lewman and Company.

Defendants admit that either one of said acts approved November 30th, 1898, made a part of this answer, and marked respectively "Exhibit B" and "Exhibit C," conferred authority upon the city of Mobile to condemn the waters of Three Mile creek.

Defendants say that said acts also authorized the con-
34 demnation of the waters in Eight Mile creek, and deny that such authority is invalid for any reason, as alleged in said paragraph seven of the bill of complaint, or as thereafter in said bill alleged.

Defendants, further answering said paragraph seven of the bill of complaint, say that said city of Mobile was expressly authorized and empowered to condemn the waters of Three Mile creek under and by virtue of an act of the General Assembly of Alabama, which authorized it to condemn the Mobile City water works, being the same water works referred to by the complainant in paragraph six of the bill of complaint as the Stein system of water works, having its source of supply on Three Mile creek. Said act of the General Assembly of Alabama authorizing it to condemn the Mobile City water works, which had the right to take water from Three Mile creek, is as follows:

(Local Acts of Alabama, 1898–'9, page 139.)

An act to authorize the city of Mobile, for the purpose of aiding in the erection of its municipal water works, to condemn, by eminent domain, the outstanding interest in what is known as the Mobile City water works

SECTION 1. Be it enacted by the General Assembly of Alabama, That the city of Mobile, for the purpose of erecting, constructing, and operating a system of water works to be owned and operated by said city, be and it is hereby expressly authorized and empowered to condemn, by exercising the rights of eminent domain in the manner provided by law, for the condemnation of lands for public use, all outstanding interests of every kind, character, or descrip-

tion, whether the same be legal or equitable, not owned by said city of Mobile, in and to those certain water works, known respectively by the names of Stein or Mobile City water works, being the same water works constructed under and pursuant to an act entitled "An act for the promotion of the health and convenience of the city of Mobile, by the introduction into said city, of a supply of wholesome water, to be used for domestic purposes, and for the extinguishment of fires." Approved January 7th, 1841. Approved December 10th, 1898.

Defendants, further answering said paragraph seven of the bill of complaint, say that acting under and by virtue of said last-named act of the General Assembly of Alabama, which conferred power upon the city of Mobile to condemn, by exercising the rights of eminent domain in the manner provided by law for the condemnation of lands for public use, what is known as the Mobile City water works, the mayor and general council of the city of Mobile, at a special meeting held in the council chamber at the municipal buildings in the city of Mobile, on February 13th, 1899, unanimously adopted the following resolution, viz:

"Be it resolved by the mayor and general council of the city of "Mobile, That the mayor and city attorney be and they are hereby "expressly authorized, empowered, and directed to file proper proceed- "ings in the probate court of Mobile county, to condemn all rights, "privileges, franchises, easements, and property of every kind, char- "acter, or description, not owned by the city of Mobile, in what is "known as the Mobile City water works, being the same water works "erected under a contract with the city of Mobile, which was rati- "fied by the General Assembly of Alabama, by an act approved "January 7th, 1841."

Defendants, further answering said seventh paragraph of the bill of complaint, say that acting under and by virtue of said resolution of the mayor and general council of the city of Mobile next hereinbefore set out, said mayor of the city of Mobile and the city attorney of the city of Mobile did file in the probate court of Mobile county, State of Alabama, on February 13th, 1899, proper proceedings to condemn the property and franchise outstanding and not owned by the city of Mobile, including the right to take water from said Three Mile creek. A copy of said proceedings so filed in the probate court of Mobile county, Alabama, *are* asked to be had and taken as a part of this answer, and *are* hereto attached, marked "Exhibit F."

Defendants, further answering said paragraph seven of the bill of complaint, say that said city intends to faithfully keep its contract with the Bienville Water Supply Company and meet the only obligation resting upon said city under the terms of said contract—that is, to pay for said fire-hydrants in accordance with the terms and conditions of the contracts made and entered into between the city of Mobile and the Bienville Water Supply Company, and made a part of the bill of complaint as Exhibits A and B.

Defendants, further answering said paragraph seven of the bill of complaint, say that at a special meeting of the mayor and general

council of the city of Mobile held on October 19th, 1898, the following resolution was adopted:

"Whereas it is the intention of the city of Mobile to build and
"operate a system of water works for the use of the city and
36 "its inhabitants, and
"Whereas there is existing a contract between the city of
"Mobile and the Bienville Water Supply Company, now,
"Therefore, be it resolved by the mayor and general council of
"the city of Mobile, That said city shall faithfully pay to said
"water company all sums of money due under said contract on its
"part until the expiration of said contract in July, 1900."

Defendants, further answering said seventh paragraph, say that it is the intention of the city of Mobile when its said system of water works are completed to supply its inhabitants with water at reasonable rates in accordance with the authority conferred upon it by law.

Eighth.

Defendants, answing the eighth paragraph of said bill of complaint, admit that the city of Mobile "has not yet designated or "finally fixed upon the source of water supply for its proposed sys-"tem with which the mains and pipes now being laid in its streets "will be connected. It proclaims through its mayor and the mem-"bers of its general council that its preferred purpose is to make "Three Mile creek its source of supply, but that if prevented from so "doing it will secure a site upon Eight Mile creek, make that stream "the source of supply for its projected system, and connect with its "plant and its mains and pipes now being laid, and convey the "water of that stream into its limits for supply to itself and its in-"habitants for all purposes. Said Eight Mile creek is a stream of "water in the county of Mobile other than and distinct from Three "Mile creek."

Defendants, further answering said eighth paragraph of the bill of complaint, specifically and expressly deny that Eight Mile creek is a continuation of and the same stream as said Clear creek; defendants insist that said Eight Mile creek is formed by the confluence or junction of Clear creek and what is known as Red creek, in said county of Mobile, and that it is the intention of said city to take the water from said Eight Mile creek if it should so decide upon for the purpose of supplying the water mains of its said water works at a point on said creek below the junction of said Clear creek and Eight Mile creek, and that it is not the intention of said city in any way to interfere with the rights of the complainant as to the use of said Clear creek.

Defendants, further answering said eighth paragraph of the bill of complaint, say that it is true that "in execution of its alternative
"or ulterior intention of so constructing its system upon or
37 "in connection with Eight Mile creek, said city applied to
"the probate court of Mobile county, on the 5th day of May,
"1898, to condemn certain lands lying on and embracing a part of
"said last-mentioned stream (Eight Mile creek) to its use in the con-

"struction of its proposed system and to supply the water therefor. "After commencing such proceedings, it discovered that it was then "without legislative authority to condemn property outside its "limits, and has therefore since dismissed such suit; but for the "purpose of remedying such want of power, and to enable it to con- "struct and operate its said system on and from Eight Mile creek, "said defendant thereupon sought and obtained from the General "Assembly of Alabama the passage of the act of November 30th, 1898 "(being the act made Exhibit C to this answer of the defendants), "authorizing it to condemn lands and property outside its limits "for use in the construction and operation of its water works.

"And it is causing its engineers and surveyors to make surveys, "estimates, and reports to it as to the most available site on said "Eight Mile creek for the location of its proposed reservoir and "source of water supply, the cost of establishing the same there, and "of connecting it with the mains and pipes now being laid by said "defendant in its streets. Defendant Bush, as the mayor of said "municipality, has been and is actively engaged in promoting and "pushing forward all the acts hereinbefore charged as having been "done and now being carried on to establish and operate said pro- "jected water-works system of the city, and said acts have been, and "are being, done with the declared intent and purpose on the part "of the defendants of establishing said system upon Eight Mile "creek and of using its water to supply said city and its inhabitants "with water in case it shall find it impracticable to use Three Mile "creek for that purpose."

Defendants deny that "all of the resolutions, proceedings, and "acts had and done by defendants in furtherance and execution of "their purpose to erect water-works system for said city upon either "Three Mile creek or upon Eight Mile creek, and to use the water "of one or the other of said streams through said system to supply "said city and its inhabitants with water, have their foundation "and authority in the charter of said city and the two acts of the "legislature approved November 30th, 1898, and that they have no "other source of grant or right," because defendants have shown, in answer to paragraph seven of the bill of complaint, that it was specially authorized and empowered by an act entitled "An act to "authorize the city of Mobile, for the purpose of aiding in the erec- "tion of its municipal water works, to condemn by eminent domain "the outstanding interest in what is known as the Mobile City water "works," and that said act specially authorized and empowered the city of Mobile to condemn the right of taking water from said Three Mile creek to supply its said water works.

Defendants, further answering said eighth paragraph of the bill of complaint, say that the complainant took its said charter from the State of Alabama under the terms contained in article XIV, section 1, of the constitution of Alabama of the year of our Lord
38 1875, which reads as follows:

"Corporations may be formed under general laws, but shall "not be created by special act, except for municipal, manufacturing, "mining, immigration, industrial, and educational purposes, or for

"constructing canals, or improving navigable rivers and harbors of "this State, and in cases where in the judgment of the General As- "sembly, the objects of the corporation cannot be attained under "general laws. All general laws and special acts passed pursuant to "this section may be altered, amended or repealed."

Defendants, further answering said eighth paragraph of the bill of complaint, expressly deny that said complainant has any exclusive privilege granted to it by its charter as the same now exists, and hence if the defendant The City of Mobile does deprive it of many customers and prevent it of getting others such competition will not in law or equity justify any court in restraining the said City of Mobile from building its said system of water works now being pushed rapidly to completion. Defendants can neither admit or deny that the effect of the building of its said system of water works will deprive complainant of all means of paying the interest on its bonds and of keeping its system in condition to perform the obligations imposed upon it by its charter. Defendants allege and charge the fact to be that if the city is prohibited and restrained from completing its said water works, then it could not meet the interest on its said water-works and sewerage bonds, shown by the bill of complaint to have been sold for the purpose of raising money to construct said water works, because, as is shown in the acts of the General Assembly of Alabama, made a part of this answer as Exhibits B and C, and in the ordinance of the city of Mobile entitled "An ordi- "nance to authorize and provide for the issuance of bonds by the "city of Mobile for the purpose of acquiring systems of water works "and sewerage," and made a part of this answer as Exhibit E, the only security for said bonds lies in the fact that the city of Mobile be allowed to complete its systems of water works and sewerage. Said acts and said ordinance provide that the money derived from the sale of said bonds shall be kept as a separate fund for the building of said public works, and that said money is only to be
39 paid out for that purpose, upon resolutions of said mayor and general council of the city of Mobile. Said act of the General Assembly of Alabama, made Exhibit B to this answer, provides that the revenue derived from the operation of said water-works system is to be used to maintain the same, to pay the interest on said bonds, and to provide a sinking fund for the payment and cancellation of said bonds. Defendants further say that said bill of complaint, in paragraph six, shows that as early as July 12th, 1897 (and which statement of the bill is true), the general council of the city of Mobile adopted a resolution or ordinance calling a special election to be held in the city of Mobile, on August 2nd, 1897, "to "ascertain whether or not a majority of the citizens of Mobile "would by their votes approve of the general council of said city "contracting for, building, purchasing, or otherwise acquiring a "system of water works to cost not exceeding five hundred thou- "sand dollars ($500,000), to be paid for by issuing bonds to be se- "cured by a mortgage upon such system; that under said resolu- "tion said special election was held, a majority of the citizens of "the city of Mobile who voted at such election voted in favor of

"such proposition, and the same was formally declared to have "been carried and approved by said general council."

Defendants, further answering, say that it is shown in the bill of complaint, and the statement is true, that prior to the first day of June, 1898, said city of Mobile took possession of the Stein or what is known as the Mobile City water works, and "commenced to "operate the same to supply its inhabitants with water, in compe- "tition with complainant, and has ever since so operated the same, "and is now doing so."

Defendants, further answering, say that it is shown in said sixth paragraph of the bill of complaint that "prior to the first day of "October, 1898, the city of Mobile made a contract with certain "parties to build for said city a complete system of water works, to "enable it to supply water to itself and its inhabitants on a
40 "large scale and to connect the same with some convenient "water supply, and that said city of Mobile agreed to pay "said parties exceeding $450,000 for such construction; that said "contract was made conditional upon the city of Mobile obtaining "authority from the legislature of Alabama to issue and sell its "negotiable bonds to obtain the means to pay said contractors the "amount fixed for their compensation; that the city of Mobile was "authorized by an act of the legislature of the State, approved "November 30th, 1898, to issue and sell its negotiable bonds for "$500,000 to raise money to pay for its proposed system of water "works; that said city has sold said bonds for a small excess of "their face value, is now issuing and delivering the same to the "purchasers thereof, and is using the proceeds thereof to pay for "the construction of said system; that the contractors mentioned "are now actively engaged in executing their contract for the con- "struction of said system, and to that end are laying mains and "pipes in the streets of said city for use in and as a part of said "projected system, and that such mains and pipes are laid in and "along many of the streets of said city in and along which the "pipes and mains of complainant's system are laid and used."

Defendants, further answering, say that in December, 1898, Messrs. M. T. Lewman and Company, its contractors, had distributed upon many of the streets of the city of Mobile mains and pipes preparatory to laying the same in the ground as a part of said projected system of water works; that its said contractors, Messrs. M. T. Lewman and Company, have made a contract with the American Pipe and Foundry Company for many thousands of tons of iron pipe to be used in said system of water works, and that said pipe company has already delivered in the city of Mobile several thousand tons of said pipe. Defendants say that all of these matters and things were well known to the *the* complainant, it being an Alabama corporation, and having its principal place of business in the city of Mobile, its president and board of di- rectors residing in the city of Mobile. Defendants say
41 that the first step towards securing its own water works was the passage of the resolution of the general council of the city of Mobile of July 12th, 1897, calling a special election and

submitting to the citizens of the city of Mobile the proposition whether they would authorize the mayor and general council of said city to buy or build a system of water works to cost not exceeding five hundred thousand dollars, and to secure said bonds by executing a mortgage upon said works. The vote of the citizens of Mobile was in favor of the proposition. The next step was the acquisition and operation of the Stein or Mobile City water works on May 14th, 1898, stated in the bill to be prior to June 1st, 1898. The third step towards securing the municipal ownership of water works was the making of the conditional contract of September 20th, 1898, with Messrs. M. T. Lewman and Company, of Louisville, Kentucky, for building the system of water works, and the conditional contract between the city of Mobile and Messrs. Sperry, Jones and Company, of Baltimore, Md., for the sale of said $750,000 of the water works and sewerage bonds of the city of Mobile, the building of said water works and the sale of said bonds under said contracts being dependent and conditional upon the city of Mobile obtaining from the General Assembly of Alabama further express power and authority to that end. Such authority was expressly conferred upon the city of Mobile by those two certain acts of the General Assembly of Alabama approved November 30th, 1898, and made Exhibits B and C to this answer.

Defendants say that the next step in securing the projected water-works system for the city of Mobile was the adoption of the ordinance of December 6th, 1898, providing for the issuance of the bonds and the execution of a mortgage upon the water works to be constructed to secure said bonds, the issuance and delivery to the purchasers of many of said bonds, and the active work of the contractors who had undertaken to build the water works, having laid the water mains and pipes in the ground in many of the streets of the city of Mobile. Defendants insist that the facts of this
42 case bring it within the rule of laches as expounded in many of the decisions of the Supreme Court of the United States; that there was nothing clandestine upon the part of the authorities of the city of Mobile. All of the facts and acts looking to the building of said municipal water works were well known, being published in the daily papers of the city of Mobile, and were matters of general notoriety.

Defendants, further answering, say that when the bills, which were enacted into laws and which are made Exhibits B and C to this answer, were pending in the General Assembly of Alabama, said complainant, The Bienville Water Supply Company, through its present attorneys, Mr. D. P. Bestor and Mr. Richard H. Clarke, appeared before the committees of the house and senate and made arguments and resisted the passage of said acts.

Defendants say that if the complainant had an exclusive privilege of supplying the city of Mobile and its inhabitants with water, and that that exclusive privilege is secured by an inviolable contract, it has by its laches lost the right to have that alleged privilege secured to it through the medium of an injunction issued by a court of equity.

Defendants, further answering, say that they adopt the language of Mr. Justice White, of the Supreme Court of the United States, and say that the bill of complainant "presents a case where there "has arisen during the existence of the delay a material change in "the situation of the parties, and, besides, is one where rights of "third parties have intervened. It cannot be said, under the case "made by the bill, that the power of a court of equity can be ex-"erted to forbid the finishing of the water-works structure (which "the bill alleges is being actively constructed) without seriously "impairing the rights of the bondholders under the ordinance (and "acts) in question. One of the methods of payment stipulated, as "we have seen, for these bonds was the revenue to be derived from "the new water works, and, of course, no such revenue can ever
"result if the water works are never to be finished. It is
43 "certain, then, that if the completion of the new water
"works (of the city of Mobile) be restrained by an injunction "that the interest of the new bondholders (Messrs. Sperry, Jones "and Company) and of the contractors (Messrs. M. T. Lewman and "Company) will be seriously affected, and that this result will be "brought about by a decree of a court of equity rendered in the "enforcement of asserted rights of complainants, who, if they had "taken timely action (and had such rights), could have adequately "protected itself from injury without resulting wrong to the rights "of many other persons."

Defendants, further answering said eighth paragraph of the bill of complaint, emphatically deny that the city of Mobile has acted in bad faith with the complainant, or that it has violated the obligation of the charter contract made by the State of Alabama with complainant.

Defendants, further answering said eighth paragraph of the bill of complaint, admit that it is the intention of the city of Mobile to continue to operate what is called the Stein water works until it has built its new system of water works and secured a source of water supply for its water mains and pipes, either from Three Mile creek or from Eight Mile creek, in said Mobile county.

Ninth.

Defendants, answering said ninth paragraph of the bill of complaint, emphatically and expressly deny that the complainant has the exclusive privilege of supplying water to the city of Mobile and its inhabitants for any period of time or upon any conditions regulating the same, and charge that the constitution of the State of Alabama, in article 1, section 23, provides:

"That no *ex post facto* law, or any law impairing the obligation "of contracts, or making any irrevocable grants of special privileges "or immunities, shall be passed by the General Assembly."

Defendants say that said provision of the constitution of Alabama last above quoted inhibits the General Assembly from granting to any individual or corporation the exclusive privilege of supplying water to said city of Mobile and its inhabitants.

44 **Tenth and eleventh.**

Defendants, answering the tenth and eleventh paragraphs of the bill of complaint, say that they submit as matter of law that admitting, which they do not, that complainant had under its charter as amended by the third section of the act of the General Assembly of Alabama, approved February 14th, 1885 (Acts of Alabama, 1884–'85, pages 489–'91), and as set out in the first paragraph of the bill of complaint, an exclusive privilege of supplying water to the city of Mobile and its inhabitants for the period of twenty years from July 1st, 1888, yet defendants say that such exclusive privilege was repealed by the passage of the following acts of the General Assembly of Alabama, viz:

(1.) An act entitled "An act to amend an act entitled 'An act to amend sections 1, 5, and 11 of an act to incorporate the Bienville Water Supply Company,' approved February 19th, 1883," approved February 23rd, 1899, and which said act is set out in full on the second page of this answer.

(2.) "An act to authorize the city of Mobile to provide, maintain, and operate systems of water works and sewerage," approved November 30th, 1898, a copy of which act is made a part of this answer as Exhibit C.

Defendants, further answering, say that said city has not been excluded from the use of Three Mile creek as a source of supply for its new system of water works; on the contrary, defendants say that said city of Mobile has been, as they have hereinbefore shown, expressly authorized to condemn by eminent domain the right to take water for its projected system of water works from the said Three Mile creek by the act of the General Assembly of Alabama entitled "An act to authorize the city of Mobile, for the purpose of aiding in the construction of its municipal water works, to condemn by eminent domain the outstanding interest in what is known as the Mobile City water works," approved December 10th, 1898.

Defendants, further answering said paragraphs ten and eleven of the bill of complaint, say that when the General Assembly
45 of Alabama passed the laws affecting the repeal of any alleged exclusive privilege of the complainant, whether said General Assembly acted under article 1, section 23, or under article XIV, section 1, or under article XIV, section 10, of the Constitution of Alabama, all questions of expediency and all questions respecting the just operation of said laws, under the power vested in the General Assembly by the constitution of Alabama, were settled by the General Assembly when said laws were enacted. Defendants say that the power vested in the General Assembly under said sections of the constitution of Alabama next before referred to cannot be delegated to any other body and must be exercised exclusively by the General Assembly, and that such questions respecting the repeal of alleged exclusive privileges are necessarily questions "of "legislative discretion, and on questions such as this, not one of "judicial determination."

Defendants, further answering, say that in amending, modifying,

altering, or repealing the act of incorporation of the complainant, the General Assembly of Alabama exercised its discretion in the premises, and that it is clear and manifest, as a matter of law, that the courts cannot interfere with matters of legislative discretion.

Twelfth.

Defendants, answering the twelfth paragraph of the bill of complaint, say that they expressly and emphatically deny that in constructing its said system of water works in accordance with express legislative authority said city of Mobile has already or will in the future inflict any damage upon complainant of which it can complain in a court of equity or a court of law.

And these defendants deny all and all manner of unlawful acts, combinations, and confederacy wherewith they are by the said bill of complaint charged; without this, that there is any other matter, cause, or thing in the said complainant's bill of complaint contained material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or
46 belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

B. B. BOONE,
City Attorney, &
E. L. RUSSELL,
Solicitors for Defendants.

STATE OF ALABAMA, }
County of Mobile. }

John Curtis Bush makes solemn oath and says: I am mayor of The City of Mobile, my codefendant in the bill of complaint filed by the complainant, and that I make this verification of this answer for myself as mayor of the city of Mobile, and also for the said city of Mobile. I solemnly swear that so much of the foregoing answer as concerns my own acts and deeds as mayor of the city of Mobile and as concerns the acts and deeds of the city of Mobile are true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

THE CITY OF MOBILE,
By J. C. BUSH, *As Mayor.*
J. C. BUSH,
As Mayor of the City of Mobile.

Subscribed and sworn to before me this 27th day of February, A. D. 1899.

FRANCIS O. HOFFMAN,
A Notary Public in and for Mobile County, Alabama.

47 EXHIBIT "A."

This agreement, made and entered into this 20th day of September, A. D. 1898, by and between the City of Mobile, a municipal corporation, organized and existing under and by virtue of the laws of the State of Alabama, party of the first part, and J. B., H. L. and L. V. Lewman, composing the firm and doing business under the name of M. T. Lewman and Company, of Louisville, Ky., parties of the second part, witnesseth:

1st. That for and in consideration of the sum of four hundred and sixty thousand, two hundred and one dollars and eighty-nine cents ($460,201.89), said parties of the second part agree, obligate and bind themselves to equip and construct a complete and perfect system of water works for the city of Mobile, according to the specifications attached to and forming a part of this agreement. It being expressly understood and agreed that this agreement shall be construed and interpreted in connection with said specifications, the same being the basis upon which this agreement is founded.

2nd. It is further expressly understood and agreed by and between the parties to this agreement that as set forth in the specifications hereto attached, all differences and disputes in reference to the work, materials, labor, and transportation used, estimates for work done, or any other thing or matter whatsoever that may arise in reference to the construction of said water works, shall be referred to the engineer of the party of the first part, and that the decision of said engineer shall be conclusive, final and binding upon the parties to this agreement.

3rd. It is further expressly understood and agreed that said parties of the second part shall give a good and sufficient bond in some reliable guaranty company to be approved by said party of
48 the first part, conditioned that said parties of the second part shall faithfully perform the obligations assumed by them under the terms and conditions of this agreement.

4th. It is further expressly understood and agreed that the specifications referred to in this agreement and made a part thereof, include the following which shall be signed by the mayor of the city of Mobile, for the party of the first part, and by the parties of the second part, viz: No. 1, specifications for the construction of a system of water works for the city of Mobile. No. 2, specifications for two Worthington compound high-duty pumping engines for Mobile, Alabama. Capacity six millions gallons each in twenty-four (24) hours. No. 3, proposal of Henry R. Worthington to furnish pumps, dated August 2-th, 1898, and directed to J. C. Bush, mayor of Mobile, Alabama.

5th. It is further expressly understood and agreed that the party of the second part, in constructing said water works, shall use and furnish the Worthington pumps as set out and described in specifications numbered two (2) and three (3), and at the prices named in the proposal described herein and made a part hereof, and numbered three (3).

6th. It is further expressly understood and agreed that the Michigan brass & iron works, hydrants and valves are to be used and furnished by said party of the second part in constructing said water works, and that fifty of said hydrants are to be equipped with additional fire connections, without additional cost for said fifty hydrants, as agreed between said city and said Michigan brass & iron works. All of the hydrants and valves of the Michigan brass and iron works are to be furnished at the prices stipulated in Schedule A, which said Schedule A is hereby made a part of
49 this agreement and is attached hereto and will be signed by the mayor of said city of Mobile and said parties of the second part. The said fifty hydrants, with additional fire connections, are to be placed in such localities of the city of Mobile as may be defined and pointed out by the engineer. The engineer mentioned and so termed in this agreement is T. W. Nicol of Mobile, Alabama.

7th. It is further expressly understood and agreed that the said parties of the second part are to furnish all material of every kind, character and description, labor and transportation necessary to be used in the construction of said water works at the prices named in said Schedule A, which has by the 6th paragraph or section of this agreement, been made a part of this agreement.

8th. It is further expressly understood and agreed that the boilers to be furnished for said Worthington pumps may be the Babcock and Wilcox sectional water-tube boilers, or the Heine safety boiler, provided however, that if the boilers of the Babcock and Wilcox Company are used, each of said three (3) boilers called for by the terms of the specifications, must be equipped with steel forged headers. The specifications for said boilers hereto attached and are and will be signed by the mayor of the city of Mobile, and by the parties of the second part. The Babcock and Wilcox specification is dated New York, August 26, 1898, and is numbered four (4), and the specification for the Heine safety boiler, is dated Mobile, Alabama, August 31st, 1898, and is numbered five (5).

9th. It is further expressly understood and agreed that should the city of Mobile find it necessary or so elect to have constructed its pump-house and stand pipe for supplying water to said water
50 works, it shall have the right to have same so erected and constructed on what is known as Eight Mile creek, near or below, at its option, the junction of what is known as Clear and Red creeks, in Mobile county, Alabama. The parties of the second part hereby agree and bind themselves to accept such location for the erection and construction of said pump-house and stand pipe and the same are to be constructed in like manner and for the same detailed prices as contained in the specifications numbered one (1) and schedule of prices "A."

10th. It is further expressly understood and agreed that on the 10th of each month first succeeding the commencement of the work and thereafter, the engineer shall render to the contractor a partial estimate of the work done in accordance with the specifications, less a deduction of ten (10) per cent.; and after the contractor shall have produced evidence that he has paid for all the material and labor

entering into the work or made satisfactory provision therefor, he shall be paid the sum of such estimate. Should the contractor fail to produce such evidence to the engineer, then such, any, or all amounts due by him for material, transportation, and labor will be deducted out of such partial estimates, and when the entire work under this contract and the specifications made a part thereof, shall have been completed to the entire satisfaction of the engineer, and said engineer shall have so certified in writing, then, sixty days thereafter, all or any balance due said parties of the second part, in this paragraph called the contractor, shall be paid, less any amounts incurred for failure to adequately prosecute the work, and provided the parties of the second part shall produce evidence satisfactory to the engineer that all claims for material, transportation, and labor have been paid. The amount of four hundred and sixty thousand, two hundred and one dollars and eighty-
51 nine cents, ($460,201.89) is intended to cover the entire cost of all the materials, labor and transportation in the complete and entire construction of the water-works system for Mobile, Alabama, as shown in the plans and specifications made a part hereof, and such changes which may be hereafter made by the engineer and accepted in writing by the said parties of the second part. This amount, however, it is expressly understood and agreed may be increased or diminished and will be finally determined by the detailed figures and prices shown in Schedule "A" forming a part of this agreement. It being the sense of this agreement that for increased work, the word work including materials, labor and transportation, the parties of the second part shall be paid at the prices named in Schedule "A," and for any deductions in work, as above defined, the deductions shall be made at the prices named in Schedule "A."

11th. It is further expressly understood and agreed that in the event of strikes, fires, epidemics, or unusual action of the elements directly affecting the parties of the second part; or in the event of changes in said work, ordered by the engineer, then the party of the second part shall be allowed additional time beyond the date herein named for the final completion of said work.

12th. It is further expressly understood and agreed that said parties of the second part shall not be held responsible for any delay occasioned by the failure or inability of the party of the first part, to acquire or select the location for the erection of any structure herein provided for, but said party of the second part shall be allowed proportionately an extension of time for the final completion of said work.

13th. It is further expressly understood and agreed that in
52 the event the said party of the first part should fail to secure to said parties of the second part the free and unobstructed right to use and occupy the streets of said city for the purpose of constructing said water works and any land or right of way necessary for the purposes herein set out, and pending the delay occasioned to said party of the second part by the inability or failure of

said party of the first part to secure to said parties of the second part the right of way aforesaid, and in the event there should be a change in the market value of the materials transportation, or labor agreed to be furnished by said parties of the second part, whereby the cost of the same should be increased, then and in that event the compensation to be paid said parties of the second part shall be readjusted on the basis of the changes in the market value of said materials, transportation and labor; and it is further expressly understood and agreed that should said parties of the second part be restrained from, or enjoined against the streets of the city or the roads of Mobile county, or other rights of way, necessary for the purposes hereinbefore named, said party of the first part agrees and binds itself to defend said parties of the second part against such injunctions or restraining orders and to hold said parties of the second part harmless against the same.

14th. It is further expressly understood and agreed that said parties of the second part shall at any time before using any materials, (except iron pipe), or proceeding with any special work which shall be a part of the general plan of construction herein provided for, have the right to demand that the engineer of the party of the first part shall inspect said materials and give to said parties of the second part instructions as to said special work and when said inspection
53 is made, or instructions given, the same shall be final and binding upon said party of the first part.

15th. It is further expressly understood and agreed that the number of miles contemplated in this agreement includes the mileage set forth in the original specifications, to wit, ninety-nine and $\frac{63}{100}$ (99.63) miles and the contract price is hereby changed from $460,201.89, to the sum of four hundred and eighty-two thousand, six hundred and ninety-seven and $\frac{89}{100}$ dollars, ($482,697.89). This paragraph modifies the amount stated in paragraph one (1) of this agreement.

16th. It is further expressly understood and agreed that this agreement is to be void unless the next General Assembly of the State of Alabama shall expressly authorize the authorities of the city of Mobile to issue bonds of the city of Mobile in an amount sufficient to pay for the water works herein provided, and said bonds shall have been sold by the city of Mobile; provided however, that in the event the city of Mobile shall not have obtained authority to issue and in pursuance of said authority have sold its bonds aforesaid, on or before the first day of January, 1899, then this agreement shall cease and determine, unless said parties of the second part shall, on or before said first day of January, 1899, notify the party of the first part, in writing, that said parties of the second part desire an extension of time in which event this agreement shall cease and determine on the first day of February, 1899.

In witness whereof, the said party of the first part has caused this agreement to be signed and executed by its mayor, J. C. Bush, and has caused its corporate seal to be hereto attached, attested

by its city clerk, R. B. Owen, Jr., and said parties of the sec-
54 ond part have hereunto set their hands and seals, the day and year first above written.

This agreement is executed in duplicate.

J. C. BUSH,

[SEAL.] *As Mayor of the City of Mobile, Ala.*

M. T. LEWMAN & CO.,

By H. L. LEWMAN.

Attest: R. B. OWEN, JR., *City Clerk.*

Witness:

T. W. NICOL.

55 EXHIBIT "B."

An act to authorize the city of Mobile to make and issue bonds for building, purchasing, or otherwise acquiring systems of water works and sewerage for the said city, and to mortgage said works to secure said bonds.

Whereas it is provided by an act entitled "An act to provide a charter for the city of Mobile," approved February 6th, 1897, section twenty-one, that the general council of said city has "the right to contract for, purchase, build or otherwise acquire public works, subject to the approval of the majority vote of the citizens of Mobile at a special election called therefor;"

And whereas at a special election, duly called and held in the city of Mobile on the second day of August, 1897, the mayor and general council of Mobile were, by a majority vote of the citizens of Mobile, authorized to contract for, purchase, build or otherwise acquire a system of water works to be owned by said city of Mobile, to cost not exceeding five hundred thousand dollars ($500,000.00), and a system of sewerage to be owned by the said city of Mobile, to cost not exceeding two hundred and fifty thousand dollars ($250,000.00), payment to be made for said works by issuing bonds and securing the same by a mortgage upon said public works;

And whereas it is deemed desirable to authorize and empower the city of Mobile to make and issue bonds to enable the mayor and general council of the city of Mobile to provide the public works so authorized, and to give the mortgage so authorized by a majority vote of the citizens of said city;

Therefore:

SECTION 1. Be it enacted by the General Assembly of Alabama, That the mayor and general council of the city of Mobile be and they are hereby, authorized and empowered to make and execute bonds of the city of Mobile to an amount not exceeding seven hundred and fifty thousand dollars ($750,000.00), with interest payable semi-annually, as evidenced by coupons attached to said
56 bonds, at such place or places as may be designated therein, and to sell and issue the same and apply the proceeds arising therefrom to the building, purchasing or otherwise acquiring a sys-

tem of water works and a system of sewerage for said city; the proceeds not exceeding five hundred thousand dollars ($500,000.00) face value of said bonds to be applied to the building, purchasing or otherwise acquiring said system of water works, and the proceeds of not exceeding two hundred and fifty thousand dollars ($250,000.00) face value of said bonds to be applied to the building, purchasing or otherwise acquiring the said system of sewerage, as authorized by said majority vote of the citizens of Mobile.

Said bonds are to run such time not exceeding forty years from the date of said bonds, and to bear such interest, not exceeding four and one-half per cent. per annum, as may be determined upon by said mayor and general council.

And the said bonds and the coupons for interest thereon shall be negotiable paper, and may be made payable to bearer, and when issued are to be designated as "city of Mobile water works and sewerage bonds."

Said bonds shall be issued under the corporate seal of said city of Mobile, and none of said bonds shall be of a lower denomination than one thousand dollars ($1,000.00), or shall be sold or disposed of by the said mayor and general council at less than par.

Said bonds shall be of such form and contain such provisions, consistent with the provisions of this act, as may be determined upon by said mayor and general council.

SECTION 2. Be it further enacted, That the said mayor and general council be and they are hereby expressly authorized and empowered to mortgage or convey by deed of trust said water works and said sewerage system to secure the payment of such bonds, and the interest thereon, as may be issued under and pursuant to this act. And the said mortgage or deed of trust may be made to such trustee, as said mayor and general council may select, and shall convey any and all property constituting a part of, or used in connection with said water works or sewerage systems, whether owned at the time of the execution and delivery of said mortgage or acquired thereafter. And said mortgage or deed of trust shall contain such provisions not inconsistent with the provisions of this act as may be determined upon by said mayor and general council.

SECTION 3. Be it further enacted, That after the lapse of ten years from the issuance of said bonds, (unless said mayor and general council elect to have the sinking fund become operative at an earlier date), after paying the operating expenses of the said works, the interest on said bonds outstanding and any repairs and extensions that may be deemed expedient by said mayor and general council, there shall remain any surplus in any one year, there shall be created with such surplus of net revenue that may be so had, and in each year, from year to year, a sinking fund, which shall be deposited in the First National Bank of Mobile, and when said fund aggregates the sum of five thousand dollars ($5,000.00) said bank shall advertise for the lowest bid from the holders of such bonds, to surrender the same to said sinking fund for payment and cancellation.

57

SECTION 4. Be it further enacted, That if the income derived from

the water works and sewerage system aforesaid is insufficient to pay the operating expenses, and the interest upon the said bonds issued under and pursuant to the terms of this act, any deficiency must be made up and paid up from the general revenue of the city of Mobile.

SECTION 5. Be it further enacted, That the bonds issued under and pursuant to the act, and interest thereon, shall be exempted from any and all taxes which may be imposed by the city of Mobile.

SECTION 6. Be it further enacted, That said mayor and general council are hereby authorized and empowered to issue and sell the said bonds, as provided for in this act, without holding a special election for the approval of the issuance of said bonds by the majority vote of the citizens of Mobile.

SECTION 7. Be it further enacted, That this act shall take effect and be in force on and after its passage.

(Signed) CHARLES E. WALLER,
Speaker of the House of Representatives.
R. M. CUNNINGHAM,
President of the Senate.

Approved November 30th, 1898.
JOS. F. JOHNSTON, *Governor.*

I, Robert P. McDavid, secretary of state of the State of Alabama, hereby certify that the pages hereto attached contain a true,
58 accurate and literal copy of the enrolled act, entitled "An act to authorize the city of Mobile to make and issue bonds for building, purchasing or otherwise acquiring systems of water works and sewerage for said city, and mortgage said works to secure said bond," approved November 30th, 1898, as the same appears on file and of record in this office.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the great seal of State at the capitol, in the city of Montgomery, this 9th day of December, 1898.

(Signed) ROB'T P. McDAVID,
Secretary of State.

59 EXHIBIT "C."

An act to authorize the city of Mobile to provide, maintain, and operate systems of water works and sewerage.

Whereas it is provided by an act entitled "An act to provide a charter for the city of Mobile," approved February 6th, 1897, section 21, that the general council of said city has the "right to contract for, build or purchase or otherwise acquire public works, subject to the approval of the majority vote of the citizens of Mobile at a special election called therefor;"

And whereas, at a special election, duly called and held in the city of Mobile on the second day of August, 1897, the mayor and general council of the city of Mobile was, by a majority vote of the citizens of Mobile, authorized to contract for, purchase, build or

otherwise acquire a system of water works to be owned by said city of Mobile, to cost not exceeding $500,000.00, and a system of sewerage to be owned by said city of Mobile, to cost not exceeding $250,000.00, payment to be made for said works by issuing bonds and securing the same by mortgage upon said public works;

And whereas it is deemed desirable to empower said city to build, purchase or otherwise acquire and maintain and operate said systems of water works and sewerage so authorized by a majority vote of the citizens of said city, therefore:

SECTION 1. Be it enacted by the General Assembly of Alabama, That the mayor and general council of the city of Mobile be, and it is hereby authorized and empowered to buy or to build, erect and maintain and operate water works for the supply of its inhabitants with water for the extinguishment of fires, and for sanitary, domestic and other purposes; and said mayor and general council of the city of Mobile is also hereby authorized and empowered to buy or to build, erect and maintain and operate a system of sewerage for the use of said city and its inhabitants.

SECTION 2. Be it further enacted, That full power be and is hereby given to said mayor and general council to enter into and make all needful contracts for acquiring a location or locations for machinery and stand pipes, reservoirs, pumps, pipes, hydrants and valves, buildings and all other parts of such system of water works; and also for laying sewer pipes, syphons, manholes, flush-tanks, pumping engines and all other parts of such system of sewerage; and also for the rights of way for the erection of said water works and said sewerage systems, and for this purpose full power and authority is hereby given to said mayor and general council to use any or all of the streets or alleys of the city of Mobile, and any or all of the public roads of Mobile county, and in the event said mayor and general council are unable to contract for other rights of way, or the land necessary for securing a location or locations for stand pipes, reservoirs, pumps, buildings, and all necessary machinery needed in erecting and constructing water works and sewerage systems authorized by this act, the said mayor and general council is hereby authorized and empowered in order to obtain the same and the water supply for its stand pipes, reservoirs, pipes, sluice-ways and canals, to condemn the water of any stream, creek, spring or river, and the lands adjacent thereto, and also the lands forming what is known as the water shed, if the same are situated in Mobile county, by the exercise of the rights of eminent domain in the manner provided by law for the condemnation of land for public uses.

Provided, however, that nothing in this section shall be applied or be construed to fix a limit of time within which said mayor and general council shall exercise the rights of eminent domain herein conferred, and provided further, that the provisions of this section shall not apply or be construed to authorize said mayor and general council to condemn or appropriate to the use of said water works the water in what is known as Clear creek, in said Mobile county.

SECTION 3. Be it further enacted, That the said mayor and general

council shall and it is hereby invested with full authority and power to make all proper regulations for preserving, maintaining and operating such water works and sewerage systems when established, and to collect such rates for waters supplied and for the use of said sewerage system as shall be sufficient to pay the interest on any bonds issued by said city for the purpose of providing said water works and sewerage systems, and the expenses necessary for operating the same, and to collect the dues for water so supplied and used, and for the use of said sewerage system, and to apply the same to the payment of such interest, provided that such
61 rates shall not exceed the usual and customary rates charged by other cities similarly situated for like service. And the mayor and general council shall be and it is hereby authorized and empowered to extend such water works and sewerage systems in any part of the county of Mobile it may deem proper, and in such event all the powers conferred upon and given to the said mayor and general council shall apply to such portions of such water works and sewerage systems.

SECTION 4. Be it further enacted, That the said mayor and general council are hereby authorized and empowered to buy or to build, erect and maintain said water works; and said mayor and general council is also hereby authorized and empowered to buy, to build, erect and maintain and operate said system of sewerage without holding a special election for the approval of the purchasing or building of said water works and said sewerage systems by the majority vote of the citizens of Mobile.

SECTION 5. Be it further enacted, That this act shall take effect and be in force on and after its passage.

(Signed) CHARLES E. WALLER,
Speaker of the House of Representatives.
R. M. CUNNINGHAM,
President of the Senate.

Approved November 30th, 1898.
JOS. F. JOHNSTON, *Governor.*

I, Robert P. McDavid, secretary of state of the State of Alabama, hereby certify that the pages hereto attached contain a true, accurate and literal copy of the enrolled act, entitled "An act to authorize the city of Mobile to provide, maintain and operate systems of water works and sewerage," approved November 30th, 1898, as the same appears on file and of record in this office.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the great seal of State at the capitol, in the city of Montgomery, this 9th day of December, 1898.

(Signed) ROB'T P. McDAVID,
Secretary of State.

62 EXHIBIT "D."

This agreement made this 20th day of September, A. D. 1898, between the City of Mobile, a municipal corporation, organized and existing under and by virtue of the laws of the State of Alabama,

party of the first part, and R. B. Sperry and Charles H. Jones, Jr., composing the firm of Sperry Jones and Company of the city of Baltimore, in the State of Maryland, parties of the second part.

Witnesseth: That the said party of the first part agree- to sell to the said parties of the second part the seven hundred and fifty thousand (750,000.00) dollars, of 4½% bonds of the city of Mobile, Alabama, for which — a circular issued the fifth day of August, A. D. 1898, and signed by John Craft and A. S. Lyons, finance committee of the general council of the city of Mobile, Alabama, proposals were asked, a copy of which circular is hereto attached. Said bonds to be sold at the rate of $1,005.63 per $1,000.00 of bonds that is to say, for seven hundred and fifty-four thousand and two hundred and twenty-two dollars and fifty cents ($754,222.50) for the entire $750,000.00 of bonds. And the said Sperry Jones and Company hereby agree and bind themselves to purchase said bonds at said price.

The said bonds are to be delivered in Baltimore and paid for after the legislation hereinafter mentioned is enacted by the General Assembly of Alabama, and as soon as said bonds can be lithographed and executed.

This agreement is made however upon the express condition that the said party of the first part shall be authorized by the General Assembly of Alabama at its next meeting, to issue and sell said bonds and that the said General Assembly of Alabama ratify and confirm the proceedings of the general council of Mobile, and all other proceedings relative to the issuance of these bonds; or such legislation as may be necessary; so that the bonds, when
63 issued and delivered to Sperry Jones and Company under this agreement, shall be the legal and binding obligations of the city of Mobile.

It is further expressly understood and agreed that before this agreement is to be finally binding upon the parties hereto said General Assembly of Alabama at the next meeting thereof is to exempt or authorize the general council of the city of Mobile, to exempt, the principal and interest of said bonds from all taxes imposed by said city; and also authorizing the said city to appropriate and pledge the net revenue to be derived from the water works and system of sewerage, intended to be built or acquired by said city from the proceeds of said bonds, to the payment of the coupons on said bonds as they severally mature, and if there be any surplus of the net revenue after paying the coupons in any one year, to create with such surplus of net revenue from year to year a sinking fund to be applied to the payment at maturity of the principal of said bonds or at an earlier date as may be provided by such legislation. It is further expressly understood and agreed that the city of Mobile shall have the right to deliver the entire amount of bonds contemplated in this issue at one time, or in instalments from time to time as the mayor of the said city of Mobile may direct, but in the event, said bonds are delivered in instalments, the city of Mobile is to give Sperry Jones and Company ten days' notice in writing prior to the delivery of each of said instalments. It is further expressly

understood and agreed that in the event that the entire amount of $750,000.00 bonds may not be required by the city of Mobile for the uses in this agreement mentioned, then and in that event Sperry Jones and Company are to receive and pay for at the rate agreed upon, as many of said bonds as may be required, whether issued at one time, or in installments from time to time within two years from the date of the first issue of said bonds. It is further expressly understood and agreed that upon the execution and delivery
64 of this agreement the said Sperry Jones and Company agree and bind themselves to immediately deposit with the said city of Mobile, the bond of the Fidelity and Deposit Company of Baltimore, Maryland, in the sum of fifteen thousand ($15,000.00) dollars conditioned and guaranteeing that Sperry Jones and Company will faithfully carry out all obligations assumed by said firm under the terms and conditions of this agreement.

It is further expressly understood and agreed between Sperry Jones and Company of Baltimore, Maryland, and the city of Mobile, that in the event said city shall not be authorized by the next General Assembly of Alabama, which convenes in November, 1898, to issue and sell said bonds, then and in that event this agreement shall cease and determine and be of no effect.

In witness whereof, the city of Mobile has caused this agreement to be signed by the mayor of said city, and to be attested by the city clerk and the corporate seal of said city to be thereto attached; and the said Sperry Jones and Company have hereunto placed their hands and seals the day and year first above written. This agreement is executed in duplicate.

J. C. BUSH,
As Mayor of the City of Mobile, Ala.

[Seal of the City of Mobile.]

Attest: R. B. OWEN, JR., *City Clerk.*

SPERRY, JONES AND COMPANY. [SEAL.]

Witness as to Sperry, Jones and Company:
WHITING AMES.

65 EXHIBIT "E."

An ordinance to authorize and provide for the issuance of bonds by the city of Mobile for the purpose of acquiring systems of water works and sewerage.

Whereas, it is provided by an act of the General Assembly of Alabama, entitled "An act to provide a charter for the city of Mobile," approved February 6th, 1897, section twenty-one, that the general council of said city has "the right to contract for, build and purchase or otherwise acquire public works, subject to the approval of a majority vote of the citizens of Mobile at a special election called therefor," and

Whereas, at a special election, duly called and held in the city of

Mobile on the second day of August, 1897, the mayor and general council of the city of Mobile were, by a majority vote of the citizens of Mobile, authorized to contract for, purchase and build or otherwise acquire a system of water works to be owned by said city of Mobile, to cost not exceeding five hundred thousand dollars ($500,000.00) and a system of sewerage to be owned by said city of Mobile, to cost not exceeding two hundred and fifty thousand dollars ($250,000.00), payment to be made for said works by issuing bonds and securing the same by mortgage upon said public works:

And whereas, at a meeting of the general council of the city of Mobile, held on the thirteenth day of May, 1898, a resolution was passed by the mayor and general council of the city of Mobile, providing for an issue of bonds pursuant to said vote of a majority of the citizens of the city of Mobile, and providing a form for said bonds; and

Whereas, by an act of the General Assembly of Alabama, approved on the thirtieth day of November, A. D. 1898, entitled "An act to authorize the city of Mobile to make and issue bonds for building, purchasing or otherwise acquiring systems of water works and sewerage for the said city and to mortgage said works to secure said bonds," the said city was duly authorized to make and issue said bonds; and

66 Whereas, it is deemed advisable to modify the ordinance of the mayor and general council of the city of Mobile aforesaid, to make it conform in all respects to the power and authority vested in said mayor and general council by the act of the General Assembly of Alabama, approved November 30th, 1898, as aforesaid, and to make further provision in relation to said bonds:

Therefore, be it ordained by the mayor and general council of the city of Mobile, That the mayor of the city of Mobile is hereby authorized to have seven hundred and fifty thousand dollars ($750,000.00) of water works and sewerage negotiable coupon bonds engraved or lithographed, and he is also authorized to contract with a trust company to put its signature to the bonds certifying the genuineness of each of said bonds; said bonds to run for a period of forty years from the date thereof; to be in the sum of one thousand dollars ($1,000.00) each; to be made payable, principal and interest, in the cities of New York and Mobile; to bear interest at the rate of four and one-half per cent. per annum; and said principal and interest to be payable in lawful currency of the United States. Said bonds shall also recite the authority under which they are issued, and are to be signed by the mayor of the city of Mobile, and attested by the clerk with the corporate seal of said city thereto affixed, and the coupons attached to said bonds are to have the engraved or lithographed signature of the city clerk subscribed thereto.

SECTION 2. Be it further ordained, That the form of said bond shall be as follows:

(*Form of Bond.*)

UNITED STATES OF AMERICA, *State of Alabama, City of Mobile.*

City of Mobile Water Works and Sewerage Bond.

$1,000.00. No. —.

Know all men by these presents: that the City of Mobile, in the State of Alabama, acknowledges itself indebted to the bearer hereof in the sum of one thousand dollars ($1,000.00), which sum it promises to pay in lawful currency of the United States on the
67 second day of January, A. D., 1939, at the American Exchange national bank, in New York city, or at the First national bank, in the city of Mobile, at the option of the holder, upon the surrender hereof, together with interest thereon, at the rate of four and one-half per cent. per annum, payable semi-annually, on the first days of July and January of each year, until and including the maturity hereof, in like lawful currency, at the same places, upon the surrender of the coupons hereto attached.

This bond is one of a series of seven hundred and fifty bonds, numbered from 1 to 750, inclusive, all of like date, tenor and amount, and is issued under an act of the General Assembly of Alabama, entitled "An act to authorize the city of Mobile to make and issue bonds for building, purchasing or otherwise acquiring systems of water works and sewerage for the said city, and to mortgage said works to secure said bonds," approved November 30th, 1898, and pursuant to an ordinance of the mayor and general council of the city of Mobile, approved December 6th, 1898.

This bond, in addition to being the direct and primary obligation of the city of Mobile, is secured by a first mortgage or trust deed made to the Mercantile Trust and Deposit Company of Baltimore, trustee, upon the water works and sewerage systems of and in said city, and any additions thereto which may hereafter be acquired.

No bond of this series shall be or become a valid obligation of said city unless the trustee named in said mortgage or trust deed shall certify the same as being one of the bonds authorized to be issued thereunder.

It is hereby recited and certified that all acts, conditions and things required to be done precedent to and in the issuance of said bonds have been done and performed in regular and due form, as required by law and ordinance.

This bond and the interest thereon is exempted by law from any and all taxes which may be imposed by the city of Mobile.

In testimony whereof, this bond is signed by the mayor and clerk of the city of Mobile, and the corporate seal of said city is hereto attached. All done in the city of Mobile this second day of January, eighteen hundred and ninety-nine.

—— ——, *Mayor.*

Attest: —— ——, *City Clerk.*

68 $22.50. *Form of Coupon.* No. —.

On the first day of July, eighteen hundred and ninety-nine, the City of Mobile, Alabama, will pay the bearer at the American Exchange national bank, in New York city, or at the First national bank, in the city of Mobile, at the option of the holder hereof, twenty-two dollars and fifty cents ($22.50), being the semi-annual interest then due on its water-works and sewerage bond.

No. —. —— ——, *City Clerk.*

Form of Certificate of Trustee.

The Mercantile Trust and Deposit Company of Baltimore, trustee, hereby certifies that this bond is one of the series of bonds of the city of Mobile authorized to be issued under the within referred to mortgage or deed of trust.

MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, *Trustee,*

By —— ——, *President.*

SECTION 3. Be it further ordained, That the mayor and city clerk of the city of Mobile be and they are hereby authorized, empowered and directed to execute, in the name of the city of Mobile, to the Mercantile Trust and Deposit Company of Baltimore, a corporation located and doing business in the city of Baltimore, Maryland, as trustee, a mortgage or deed of trust upon the water works and sewerage systems contemplated by the acts of the General Assembly of Alabama, approved on the thirtieth day of November, eighteen hundred and ninety-eight, hereinbefore referred to, covering the whole of said water works and sewerage systems, and all the extensions, improvements and renewals thereof and additions thereto owned at the date of said deed of trust, or thereafter acquired, including the real estate upon which the said works and systems are located, and the right to the use of the streets, alleys, sidewalks, public avenues, parks and other highways, and grounds of said city, acquired or used for the purpose of building, erecting, maintaining, operating,
enlarging or extending said water works or sewerage system,
69 and all the franchises and easements used or needed in or for
said water works and sewerage systems owned at the date of said deed or thereafter acquired. Said deed of trust shall contain the usual stipulations of similar deeds of trust relating to the default in the payment of the interest, keeping said water works and sewerage systems in repair, etc. And shall provide that none of the bonds hereby secured shall be valid or binding against said city of Mobile until they are duly certified by the trustee named in the deed of trust, in the usual manner in which certifications are made.

That the bonds authorized hereunder, together with the interest thereon, shall be exempt from any and all taxes levied by the city of Mobile.

And said deed of trust having been produced at this meeting of the mayor and general council of the city of Mobile, of which the following is a copy:

This indenture, made this second day of January, A. D. eighteen hundred and ninety-nine, by the city of Mobile, a municipal corporation, created, organized and existing by and under the laws of the State of Alabama, and located in the county of Mobile, in the said State, party of the first part, and the Mercantile Trust and Deposit Company of Baltimore, a corporation created, organized and existing by and under the laws of the State of Maryland, and located and having its principal office in the city of Baltimore, in said State, party of the second part, witnesseth:

Whereas, the party of the first part, by the act of the General Assembly of Alabama, entitled "An act to authorize the city of Mobile to provide, maintain and operate systems of water works and sewerage," approved November 30th, A. D. 1898, was authorized to buy, erect and maintain, and operate systems of water works and sewerage to supply the city of Mobile and its inhabitants with water works and sewerage; and

Whereas an act of the General Assembly of Alabama, entitled: "An act to authorize the city of Mobile to make and issue bonds for building, purchasing, or otherwise acquiring systems of water works and sewerage for the said city, and to mortgage said works to secure said bonds," approved November 30th, 1898, conferred upon said party of the first part the express power and right to
70 issue bonds secured by a mortgage upon the property and effects connected with the operation of said water works and sewerage systems: and

Whereas, the said party of the first part by an ordinance entitled: "An ordinance to authorize and provide for the issuance of bonds by the city of Mobile, for the purpose of acquiring systems of water works and sewerage," approved December 6th, A. D. 1898, did determine and ordain that said party of the first part, under the express power and authority conferred upon it by the said General Assembly of Alabama, should issue its bonds to the amount of seven hundred and fifty thousand dollars, ($750,000.00) of the denomination of one thousand dollars ($1,000.00) each, to be dated the second day of January, eighteen hundred and ninety-nine, with interest coupons attached thereto, payable semi-annually, and said bonds to run for a period of forty (40) years from their date, and the principal and interest coupons thereof to be payable at the American Exchange national bank in the city of New York, State of New York, and at the First national bank in the city of Mobile, State of Alabama. The coupons on said bonds to be payable on the first days of July and January in each year, from the date of said bonds, to and including the maturity thereof. Said bonds to bear interest at the rate of four and one-half per centum (4½ %) per annum, and to be signed by the mayor and city clerk of the city of Mobile, but the engraved or lithographed signature of said city clerk to the coupons of said bonds should be deemed to have the same force and effect as a manual signature thereof; and

Whereas, said ordinance further provided, that said bonds should be substantially in the following form, to wit:

UNITED STATES OF AMERICA, *State of Alabama, City of Mobile.*

City of Mobile Water Works and Sewerage Bonds.

$1,000.00. No. —.

Know all men by these presents: that the City of Mobile, in the State of Alabama, acknowledges itself indebted to the bearer hereof in the sum of one thousand dollars ($1,000), which sum it promises to pay in lawful currency of the United States on the second
71 day of January, A. D., nineteen hundred and thirty-nine, at the American Exchange national bank in New York city, or at the First national bank in the city of Mobile, at the option of the holder, upon the surrender hereof, together with interest thereon at the rate of four and one-half per cent. per annum, payable semi-annually, on the first days of July and January of each year until and including the maturity hereof, in like lawful currency at the same place, upon the surrender of the coupons hereto attached.

This bond is one of a series of seven hundred and fifty bonds, numbered from 1 to 750 inclusive, all of like date, tenor and amount, and is issued under an act of the General Assembly of Alabama, entitled "An act to authorize the city of Mobile to make and issue bonds for building, purchasing, or otherwise acquiring systems of water works and sewerage for the said city, and to mortgage said works to secure said bonds," approved November 30th, 1898, and pursuant to an ordinance of the mayor and general council of the city of Mobile, approved December 6th, 1898.

This bond, in addition to being the direct and primary obligation of the city of Mobile, is secured by a first mortgage or trust deed made to the Mercantile Trust and Deposit Company of Baltimore, trustee, upon the water works and sewerage systems of and in said city, and any additions thereto which may hereafter be acquired.

No bond of this series shall be or become a valid obligation of said city unless the trustee named in said mortgage or trust deed shall certify the same as being one of the bonds authorized to be issued thereunder.

It is hereby recited and certified that all acts, conditions and things required to be done precedent to and in the issuance of said bonds have been done and performed in regular and due form as required by law and ordinance.

This bond and the interest thereon is exempted by law from any and all taxes which may be imposed by the city of Mobile.

In testimony whereof, this bond is signed by the mayor and clerk of the city of Mobile, and the corporate seal of said city is hereto attached. All done in the city of Mobile, this second day of January, eighteen hundred and ninety-nine.

—— ——, *Mayor.*

Attest: —— ——, *City Clerk.*

72 $22.50. *Form of Coupon.* No. —.

On the first day of July, eighteen hundred and ninety-nine, the City of Mobile, Alabama, will pay the bearer at the American Ex-

change national bank in New York city, or at the First national bank, in the city of Mobile, Alabama, at the option of the holder hereof, twenty-two dollars and fifty cents ($22.50), being the semi-annual interest then due on its water-works and sewerage bond No. —.

—— ——, *City Clerk.*

And whereas, said ordinance further authorized, empowered and directed the mayor and clerk of the said city of Mobile, to execute and deliver in the name of and for the city of Mobile, to the Mercantile Trust and Deposit Company of Baltimore, a corporation located in Baltimore, Maryland, trustee, as security for the holders of the bonds and coupons issued under this ordinance, a mortgage or deed of trust upon the water works and sewerage systems contemplated by said acts of the General Assembly of Alabama, and said ordinance, covering the whole of said water works and sewerage systems and all extensions, improvements and renewals thereof, and additions thereto, owned or hereafter acquired, including the real estate upon which the water works may be located, and the right to use the streets, alleys, sidewalks, public avenues, parks and other highways and grounds of said city, for the purpose of maintaining and operating said water works and sewerage systems, and all the franchises and easements used or needed in said systems. Said mortgage providing that none of the bonds thereby secured shall be a valid or binding security against said city until they are duly certified by the trustee named in the mortgage, in the usual manner in which such certifications are made; and

Whereas, said ordinance further provided that said bonds should be delivered to the purchasers thereof at such times and in such amounts as the mayor and general council of the city of Mobile may thereafter direct, and the money realized therefrom should be kept and set apart as a separate fund for the purpose of providing the city of Mobile with systems of water works and sewerage, and that none of said money should be paid out except under an ordinance or ordinances of the said mayor and general council of the city of Mobile.

73 Now, therefore, in consideration of the premises, and of the sum of one dollar ($1.00), this day paid to the party of the first part, by the party of the second part, the receipt of which is hereby acknowledged, and in order to secure the payment of the principal and interest to the holders of said seven hundred and fifty bonds of $1,000 each, equally and ratably, as the same shall become due and payable, and for the further purpose of securing the performance of the covenants hereinafter contained, the said party of the first part hereby grants, bargains, sells, and conveys unto the said party of the second part, all of the real estate, buildings, structures, engines, machines, appliances, appurtenances, tools, hydrants, pipes, pumps, reservoirs, stand pipes, meters, and sewer pipe, manholes, siphons, flush-tanks, pumping engines, and all property of every kind, character or description, pertaining to or used in or by said water works and sewerage systems, and all of the

property, real, personal and mixed, of whatever kind and description and wheresoever situated, now owned or possessed, or which may be hereafter acquired by the said city of Mobile, for use in, or connected in any way with the construction, use, maintenance, or operation of the said water works and sewerage systems, whether such systems or a portion thereof be acquired by purchase or construction, and also, all of the material on hand at the time possession of such property may be demanded by the trustee under this mortgage, or by any receiver under any order of court, and that may be on hand at the time of any sale under this mortgage, and there is hereby conveyed to said trustee and its successors, in trust, and to the purchasers at any sale under this instrument, their successors and assigns, the right, privilege and authority to operate said water works and sewerage systems in the said city of Mobile, and for such purposes the right to use the streets, alleys, lanes, parks, and other public highways and grounds of said city, free from any other tax, except the usual municipal tax laid upon property within said city by the same, and such license tax as may be levied by ordinance for doing business in said city, and such reasonable right-of-way tax for the use of the streets, as may be fixed by the mayor and general council, not to exceed one per cent. of the gross revenues.

And said trustee and its successors in trust, and the purchasers shall further have the right, privilege and authority, to use any of the streets or other public grounds or highways of said city for the maintenance and operation of said water works and sewerage systems, and shall have the right to charge the city and the in-
74 habitants thereof for the use of the water or sewers supplied by said trustee or purchasers, upon such terms, and for such prices, as may be agreed upon, which shall not exceed charges made in other cities of the same size of the city of Mobile.

To have and to hold, all of the said property, franchises, easements, privileges and other granted rights, to said party of the second part, its successors in trust and assigns forever, for the uses and purposes hereinafter expressed and declared and for the equal *pro rata* benefit and security of all persons or corporations as shall, from time to time, become the holders of any of the aforesaid bonds and coupons to each respectively, without preference or priority by reason of priority in time of negotiations, or for any other reason whatever.

Nevertheless, this mortgage or deed of trust, is executed and delivered upon the following terms, conditions, covenants and agreements:

First. Until default shall be made in the performance of the conditions of this instrument, or any of them, the said party of the first part shall remain in possession and retain the exclusive control of the mortgaged premises and property and every part thereof, and shall collect, take, and use the earnings, profits, income, and revenues from the same, and dispose of them as if this deed had not been made, and any bonds of the series issued under and by authority of the acts and ordinance aforesaid, and secured by this

mortgage or deed of trust, shall not be and become a valid and binding obligation of said city of Mobile, until the trustee named herein, or its successor in trust, shall endorse on each bond a certificate that the same is one of a series of bonds authorized to be issued under said mortgage or deed of trust. Such certificate shall be substantially in the following words:

Trustee's Certificate.

The Mercantile Trust and Deposit Company of Baltimore, trustee, hereby certifies that this bond is one of a series of bonds of the city of Mobile, Alabama, authorized to be issued under the within referred to mortgage.

MERCANTILE TRUST AND DEPOSIT
COMPANY OF BALTIMORE, *Trustee*,
By —— ——, *President.*

75 And upon the certification of said bonds as aforesaid, the said trustee shall forthwith deliver them to the mayor of the city of Mobile, or to such persons or firms as said mayor may in writing direct.

Second. In case default shall be made in the payment of the principal of any of said bonds at maturity, upon demand made therefor by and on behalf of the holders of any of the said bonds, at or after maturity thereof, and such default shall continue for three months after such demand, or in case default shall be made in the payment of any of the interest coupons attached to any of said bonds, according to the tenor thereof, upon demand therefor, and such default shall continue for three months after such demand, or in case default shall be made in any of the other requirements of this indenture, and such default shall continue for three months, then and in case of any or either default continuing as aforesaid, the said trustee, or its successors in trust, may, and at the request in writing of holders of one-fifth of the bonds hereby secured then outstanding and unpaid, shall, with or without entry, sell and dispose of all the mortgaged premises and property, with all the improvements, renewals and additions thereto, and with all the rights, easements and franchises hereby conveyed, at public auction, to the highest bidder, for cash, in the city of Mobile, Alabama, after first publishing notice of the time, place and terms of sale, and a general description of the property and rights to be sold, in one or more newspapers published in the city of Mobile, Alabama, and in the city of Baltimore, Maryland, once a week for six consecutive weeks preceding the time appointed for the sale, and upon the happening of such sale, the said trustee, or its successor in trust, shall convey the property and rights sold by proper deed or deeds to the purchaser or purchasers thereof, absolutely and in fee-simple, and the said conveyance shall be made in the name of and for the city of Mobile, by such trustee as its attorney-in-fact, and all necessary rights, power and authority is hereby given to said trustee or its successor in trust, to execute and deliver such deed or deeds, and said trustee, or its successor or successors in trust, shall also make and deliver any such further deeds it may be

advised is proper to be made in its own name as trustee or otherwise. After having deducted from the proceeds of said sale, all costs, charges and expenses thereof, including a reasonable sum as compensation to the trustee for counsel fees, (and counsel fees are to be allowed whether the property and rights are sold under the power of sale contained in this mortgage or deed of trust, or under foreclosure proceedings in the courts), and all necessary
76 expenses incident to or attending such sale, said trustee or its successors in trust shall apply the proceeds of such sale to the payment of the principal of such of the aforesaid bonds as may be at the time outstanding and unpaid, whether the same shall have previously become due or not, and of the unpaid interest which shall, at that time, have accrued on the principal without discrimination or preference, but ratably to the aggregate amount of such unpaid principal and such accrued and unpaid interest, and if, after satisfaction thereof as aforesaid, a surplus of such proceeds shall remain, said trustee, or its successors in trust, shall pay over the same to the party of the first part, its successors or assigns; but nothing herein shall be construed as relieving the said city of Mobile from liability for and payment of any balance due upon said bonds, and the interest thereon in the event that the proceeds of the sale authorized hereunder should be insufficient to fully discharge the same. In the event of any default in the payment of the principal or interest, then if the debt due, and the expenses (including compensation to the trustee and counsel fees incurred by reason of such default), are paid before the day of sale, the right to possession by the trustee or its successors to cease until further default.

The party of the first part, for itself and its successors, covenants with said trustee and its successors in trust, that in case a sale shall be made under the aforegoing powers, it and they will execute, deliver and confirm to the purchaser or purchasers at such sale such confirmatory deed or deeds and grants and confirmations as may be reasonably demanded, to fully effectuate the purposes of said mortgage or deed of trust, but this shall not deprive the party of the first part of any statutory right of redemption which it may have.

Third. At any sale of the aforesaid property and rights, or any part thereof, whether made by virtue of any of the powers hereby granted and given, or by and under the order, decree or judgment of any court, the said trustee, or its successors in trust, may, if it shall consent to do so, bid for and purchase the property and rights so sold, or any part thereof, for and in behalf of the holders of the bonds secured by this instrument in proportion to the respective interests of said bondholders. And the said bondholders may themselves, or by their agent or agents, bid for and purchase the property and rights so sold, or any part thereof.

Fourth. The party of the first part hereby covenants and agrees with said party of the second — and its successors in trust, that
77 it will, from time to time, and whenever requested to so do, execute, acknowledge and deliver all such other and further

deeds, grants and papers as may be needed to assure and confirm the said trustee, or its successors in trust, or said bondholders in and to all the property and rights intended to be hereby conveyed and assured.

Fifth. The said trustee, and its successors in trust, shall have the full power, at its discretion, upon a written request of the party of the first part, to convey by way of release or otherwise, to the persons or corporations designated by the party of the first part, any lands or other property covered by this mortgage or deed of trust, which shall not be necessary for use in connection with said water works and sewerage systems, or the business thereof, and also to convey, as aforesaid, and on a like request, any lands occupied by said systems other than the public streets, or alleys, or lanes, or sidewalks, or avenues, and which may become disused by reason of the change of location of any house, shop or structure connected with said water works and sewerage systems, and also to allow the party of the first part, from time to time, to dispose of such portions of the equipment, machinery, appliances, implements or tools, at any time held or acquired for the use of the said water works or sewerage systems, or the business connected therewith, as may have become unfit for said use upon its replacing the same by new of equal or greater value, which shall then become subject to the operation of these presents.

Sixth. Nothing herein contained shall be held to deprive said trustee, or its successors in trust, or the holders of the bonds secured by this mortgage or deed of trust, of the right to avail itself or themselves of any legal or equitable remedy for collecting the principal and interest of said bonds or of availing themselves of the privilege of bringing any suit thereon in any court of competent jurisdiction, without regard to this mortgage or deed of trust.

Seventh. The party of the first part hereby further covenants and agrees with the said trustee and its successors in trust, that it shall and will at all times hereafter, observe, perform and keep all the conditions, covenants and provisions contained herein.

Eighth. Neither the party of the second part nor its successors in trust, as trustee, shall be under any obligation to recognize any person, firm, association or corporation, as holder or owner of any of the bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any such person, firm, association or corporation, claiming to be such holder or owner,
78 until such person, firm, association or corporation shall produce the bonds, he, they or it claim to own, and deposit the same with the trustee, and shall indemnify the trustee to its full satisfaction for any and all costs, expenses and outlays, counsel fees, and other reasonable disbursements for which it may become liable or responsible on proceeding to carry out such request or demand.

Should any suit or proceeding be brought against the trustee herein, by reason of any matter or thing connected with the trust hereby created, or by reason of its being such trustee, it shall be under no obligation to enter an appearance by counsel or in any way to appear in or defend such suit or proceeding until indemni-

fied to its full satisfaction for so doing, but it may nevertheless appear and defend same without indemnity if it shall elect to do so, and in such case it shall be compensated therefor for all expenses, outlays, disbursements and service by and from the trust fund. In case at any time it shall be necessary or proper for the trustee to make any investigations respecting any fact preparatory to taking or not taking any action, or to the doing or not doing anything as trustee, the certificate of the party of the first part under its corporate seal, and its name, signed by its mayor and clerk, shall be sufficient evidence of such fact to protect the trustee in any action it may take or refuse to take by reason of the supposed existence or non-existence of such fact.

It shall be no part of the duty of the party of the second part to see to the filing and recording of this indenture as a mortgage, or to the doing of any other fact which may be suitable and proper to be done for the preserving of the lien thereof, or for giving notice of the existence of such lien; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any future policies of insurance that may be taken out.

The trustee shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act or default of its agent, attorney or employee, selected with reasonable discretion.

The trustee and its successors in trust shall be entitled to be reimbursed for all proper outlays of every reasonable sort by it incurred in the discharge of this trust, and to receive a reasonable and proper compensation for any duties that it may perform in the discharge of the same. And all such compensations shall be and continue a first lien on the mortgaged property.

79 The recitals contained herein are made on behalf of the party of the first part, and the party of the second part assumes no responsibility as to the correctness of any statement therein contained.

Ninth. In case that the trustee herein appointed, or any succeeding trustee, or trustees, shall at any time desire to be discharged from the trust hereby created, or decline or become incapable for any reason to act in the trust of these presents, or in case for any cause said trusteeship shall become vacant, then, and in every such case, and so often as the same shall happen, the holders of the majority in amount of the bonds secured hereby then outstanding or unpaid, shall have the right to appoint a new trustee, and so often as any new trustee shall be appointed, and immediately upon such appointment and qualification, all the estate, property, rights, franchises, powers and easements, which shall for the time being be held upon the trusts hereof, shall thereupon vest in the new trustee or trustees.

Tenth. It is hereby further covenanted and agreed by and between the parties hereto, that if the party of the first part shall well and truly pay all the sums of money herein required to be paid by it, and interest thereon, at the time and in the manner

specified herein, and shall well and truly keep and perform all of the covenants and agreements herein required to be kept and performed by it, according to the true intent and meaning of these presents, then and in that case, the right, title and interest of said trustee and its successors in the trust hereby created in the property hereby conveyed, shall cease, determine and become void; otherwise this mortgage or deed of trust shall remain in full force and effect.

Eleventh. The party of the second part accepts the trust hereby created by these presents, for itself and its successors in trust.

In witness whereof, the said city of Mobile, a municipal corporation as aforesaid, party of the first part, has caused its corporate name to be signed to this instrument by its mayor and clerk, and caused its corporate seal to be affixed, and the Mercantile Trust and Deposit Company of Baltimore, a corporation as afore-
80 said, in testimony of its acceptance of the trusts hereby created, has caused its name to be signed hereto by its president, and attested by its secretary, and its corporate seal to be hereto affixed.

THE CITY OF MOBILE,
By —— ——, *Mayor.*
Attest: —— ——, *City Clerk.*
MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE,
By —— ——, *President.*
Attest: —— ——, *Secretary.*

STATE OF ALABAMA, }
County of Mobile. }

I, —— ——, a notary public in and for said county and State, do hereby certify that J. C. Bush, as mayor, and R. B. Owen, Jr., as city clerk of the city of Mobile, a municipal corporation, created and existing under the laws of Alabama, whose names are signed to the aforegoing conveyance or deed of trust, and who are known to me personally, and known by me to be the officers, as above described, of the said city of Mobile, respectively acknowledged before me on this day, that being informed of the contents of such conveyance or deed of trust, they executed the same voluntarily as an act and deed of said municipal corporation, on the day the same bears date.

Given under my hand and official seal at the city of Mobile, and State of Alabama, on this second day of January, A. D. 1899.

[SEAL.] —— ——,
A Notary Public in and for Mobile County, State of Alabama.

STATE OF MARYLAND, }
City of Baltimore, } *To wit:*

I, —— ——, a commissioner of deeds for the State of Alabama, duly appointed thereby, and acting as such in and for the city of Baltimore, and State of Maryland, do hereby certify that —— ——, as president, and —— ——, as secretary of the Mercantile Trust and

Deposit Company of Baltimore, a corporation organized under
81 the laws of the State of Maryland, and located and doing business in the city of Baltimore, in said State, whose names are signed to the aforegoing conveyance or deed of trust, and who are known by me personally, and known by me to be the officers of said Mercantile Trust and Deposit Company of Baltimore, as above described, respectively acknowledged before me on this day, that being informed of the contents of said conveyance or deed of trust, they executed the same voluntarily as an act and deed of the said Mercantile Trust and Deposit Company of Baltimore, on the day the same bears date.

Given under my hand and official seal at the city of Baltimore this — day of January, A. D., 1899.

——— ———,
Commissioner of Deeds for Alabama, Residing in the City of Baltimore, Maryland.

SECTION 4. Be it further ordained, That the said form of deed of trust or mortgage, herein next before set out be and is hereby ratified and approved, and that the mayor and city clerk of the city of Mobile, be and they are hereby expressly authorized, empowered and directed to sign, seal and deliver the same as the act and deed of the city of Mobile.

SECTION 5. Be it further ordained, That said bonds hereby authorized, when certified and delivered by the trustee, as provided in said deed of trust, shall be delivered by the mayor of the city of Mobile to Sperry, Jones & Company, of Baltimore city, Maryland, upon the payment therefor by Sperry, Jones & Company, as provided in the contract heretofore entered into by Sperry, Jones & Company with the city of Mobile for the purchase of said bonds, the said purchase-money to be paid to the city of Mobile, and deposited in the depositories of the city of Mobile designated by ordinance as the legal depositories of the city of Mobile, and said money is hereby set apart as a separate fund for the purpose of providing the city of Mobile with a system of water works, and the sewerage system, as provided in the above-recited acts of the General Assembly of Alabama, and in this ordinance.

SECTION 6. Be it further ordained, That all ordinances, and parts of ordinances, in conflict with the provisions hereof, be and the same are hereby repealed.

SECTION 7. Be it further ordained, That this ordinance shall take effect and be in force on and after its adoption.

82 I hereby certify, that the foregoing is a true copy of an ordinance passed by the mayor and general council of the city of Mobile on the sixth day of December, and approved by the mayor of the city of Mobile on the same date, to wit, December sixth, eighteen hundred and ninety-eight, and that said ordinance was passed by the said mayor and general council in strict conformity with all the provisions of the charter of the city of Mobile.

(Signed) R. B. OWEN, JR., *City Clerk.*

[Seal of City of Mobile.]

83 EXHIBIT "F."

STATE OF ALABAMA, }
Mobile County. }

In the Probate Court of Mobile County.

In re Application of the City of Mobile to Condemn all Interests of Every Kind, Character, and Description of WALTER WOOD and the BIENVILLE WATER SUPPLY COMPANY, a Corporation, in and to Those Certain Water Works Known as the Mobile City Water Works.

To the Honorable Price Williams, Jr., judge of probate:

Your petitioner, The City of Mobile, a municipal corporation, organized and existing under and by virtue of the laws of the State of Alabama, respectfully shows unto your honor:

1.

Your petitioner has been expressly authorized and empowered, under and by virtue of an act of the General Assembly of Alabama, entitled "An act to authorize the city of Mobile to provide, maintain and operate systems of water works and sewerage," approved November 30th, 1898, to erect and maintain and operate systems of water works and sewerage, to supply the city of Mobile and its inhabitants with water works and sewerage.

2.

Your petitioner further shows that under and by virtue of said act of the General Assembly of Alabama, mentioned in paragraph one of this petition, your petitioner was expressly authorized and empowered to condemn in the manner provided by law for the condemnation of lands for public use the water in any stream or creek in Mobile county other than what is known as Clear creek, in said county, and all necessary lands for erecting and locating its reservoirs, stand pipes, pumping engines, water pipes and mains, etc.

3.

Your petitioner further shows that it is the owner of 45.72 per cent. of what is known as the Mobile city water works, and that Walter Wood, who is a resident of the city of Philadelphia,
84 in the State of Pennsylvania, until recently owned 54.28 per cent. of said Mobile city water works. Your petitioner has reason to believe and does believe that said Wood has transferred recently all or some of his interests in said water works to the Bienville Water Supply Company, a corporation doing business in Mobile county, Alabama.

Your petitioner further shows that it desires to build and is now actively engaged in building the systems of water works and sewerage it was empowered to erect, manage, and control under and by virtue of said act of the General Assembly of Alabama mentioned

in paragraph one of this petition, and desires to condemn for public use and to be used in constructing its water works all of the interests of said Walter Wood and that of the Bienville Water Supply Company, a corporation organized under the laws of Alabama, in said Mobile city water works, including in the same the rights of taking water from said Three Mile creek, his and its interests in the franchise existing in the owners of said Mobile city water works to supply water to the city of Mobile and its inhabitants, in the pumping engine, stand pipe, reservoir, water mains and pipes, easements of every kind, character, and description appertaining to said water works, all of the water pipes laid in the public roads of Mobile county and in the streets of the city of Mobile, and also what interests, if any, said Walter Wood and the Bienville Water Supply Company may own in the following-described tracts of land situated in Mobile county, State of Alabama, as follows:

That tract of land in the county of Mobile formerly within the limits of the city of Mobile and bounded east by Catherine street, south by Spring Hill road, west by Van Rensalear or Kilmarnock street, and north by Centre street, and known as the "Reservoir square."

2. Also the fractional division "D," containing twenty acres and fractional division "E," containing fifty-two and $\frac{40}{100}$ acres, of section 12, in township four south, range two west, in Mobile county, which said divisions "D" and "E" were sold as the southeast
85 subdivision "B" of said section and patented by the United States to the corporate authorities of the city of Mobile on March 20th, 1834.

3. Also squares eighty-nine (89), ninety (90), one hundred and nine (109), one hundred and ten (110), one hundred and eleven (111), and one hundred and twelve (112), in section thirteen (13), township four (4) south, range two (2) west, as designated on the map made by Willis Roberts and recorded in the office of the probate judge of Mobile county in Book of Miscellanies "B," page 170.

4.

Your petitioner further shows that it has been expressly authorized and empowered to condemn all of the interests of every kind, character, and description of said Walter Wood and the Bienville Water Supply Company, a corporation, whether the same be legal or equitable, in said Mobile City water works under and by virtue of the terms of the following act:

"An act to authorize the city of Mobile, for the purpose of aiding in
"the erection of its municipal water works, to condemn, by emi-
"nent domain, the outstanding interest in what is known as the
"Mobile City water works."

SECTION 1. Be it enacted by the General Assembly of Alabama, That the city of Mobile, for the purpose of erecting, constructing, and operating a system of water works to be owned and operated by said city, which said water works will have sufficient pressure upon the water mains and pipes to extinguish fires that may occur in said

city, without the use of fire-engines, be, and it is hereby expressly authorized and empowered to condemn by exercising the rights of eminent domain provided by law for the condemnation of lands for public use; all outstanding interests of every kind, character or description, whether the same be legal or equitable, not owned by the city of Mobile, in and to those certain water works known respectively by the names of Stein or Mobile city water works, being the same water works constructed under and pursuant to an act entitled "An act for the promotion of the health and convenience of the city of Mobile, by the introduction into said city, of a supply of wholesome water to be used for domestic purposes, and for the extinguishment of fires. Approved January 7th, 1841." Approved December 10th, 1898.

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5.

Your petitioner further represents and shows unto your honor that it is authorized by law to condemn the interests of said Wood and the Bienville Water Supply Company, a corporation, in the Mobile city water works, and now asks your honor to enter the proper orders and proceedings to enable your petitioner to condemn the interests of said Wood and the Bienville Water Supply Company, a corporation, under and by virtue of the said acts of the General Assembly of Alabama entitled respectively "An act to authorize the city of Mobile to provide, maintain, and operate systems of water works and sewerage," approved November 30th, 1898, and an act entitled "An act to authorize the city of Mobile, for the purpose of aiding in the construction of its municipal water works, to condemn by eminent domain the outstanding interests in what is known as the Mobile city water works," approved December 10th, 1898; that your honor will cause service of process to be had upon said Walter Wood and the Bienville Water Supply Company of this application to condemn his, said Wood's, and the Bienville Water Supply Company's said interests in said Mobile city water works, as provided by law; that your honor will set a day for hearing this application and grant the same in accordance with law.

6.

Your petitioner further shows that this application to condemn the interests of said Walter Wood in the Mobile city water works was authorized to be filed in this honorable court under and by virtue of a resolution of the mayor and general council of the city of Mobile approved February 13th, 1899.

B. B. BOONE,
City Attorney, and
E. L. RUSSELL,
Attorneys for the Petitioner.

87 STATE OF ALABAMA, }
Mobile County. }

Personally appeared before me, H. O. Haynie, a notary public in and for the county of Mobile, State of Alabama, J. C. Bush, who is

personally known to me and by me known to be the mayor of the city of Mobile, who, being by me first duly sworn according to law, on oath declares and says that he has read the above and foregoing petition and fully understands the same, and that the matters and things appearing in the said petition are true in substance and in fact, and that said petition above set out to condemn the interests of said Walter Wood in the Mobile city water works has been expressly authorized by a resolution of the mayor and general council of the city of Mobile, approved February 13th, 1899.

J. C. BUSH,
Mayor of Mobile.

In witness whereof I have hereunto set my hand, at the city of Mobile, this 13th day of Feb'y, 1899.

H. O. HAYNIE,
A Notary Public in and for Mobile County, Alabama.

I hereby acknowledge myself surety for costs in above proceeding.

J. C. BUSH.

The State of Alabama to any sheriff of the State of Alabama, Greeting:

We command you to cite Walter Wood, if to be found in your county, to be and appear before the honorable the probate court to be holden for Mobile county, at the court-house of said county, in the city of Mobile, on the 10th day of March, 1899, at 10 o'clock a. m., in the matter of the petition by the City of Mobile for the condemnation of *your* interest in the Mobile city water works—see copy of application hereto attached—and further to do and suffer such things as shall be considered and ordered in the premises by the court aforesaid. Herein fail not, and have you then and there this writ.

Witness Price Williams, Jr., judge of the probate court of Mobile county, at office, this 13th day of February, A. D. 1899.

PRICE WILLIAMS, Jr., *Judge.*

Endorsed: No. 209. In equity. U. S. circuit court, southern district of Alabama. Bienville Water Supply Co. *versus* The City of Mobile *et al.* Answer of the defendants and the exhibits thereto. Filed February 27th, 1899. Richard Jones, clerk.

88 *Replication to Answer.*

Circuit Court of the United States, Fifth Judicial Circuit.

BIENVILLE WATER SUPPLY COMPANY
vs.
CITY OF MOBILE and JOHN CURTIS BUSH. } No. 209. In Equity.

This repliant, The Bienville Water Supply Company, saving and reserving to itself all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties,

and insufficiencies of the answer of the said defendants, for replication thereunto saith it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied into and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

BESTOR & GRAY,
R. H. CLARKE,
Solicitors for Complainant.

Filed May 3rd, 1899.

RICHARD JONES, *Clerk.*

Amendment to Bill.

In Equity. In U. S. Circuit Court at Mobile.

THE BIENVILLE WATER SUPPLY COMPANY, Complainant,
vs.
THE CITY OF MOBILE, Defendant. } No. 209.

Complainant moves the court for leave to amend the tenth
89 paragraph of its bill of complaint by striking out the first sentence thereof down to and including the words "and its inhabitants" and by substituting in place of the part so stricken out the following, viz:

"Complainant further shows and charges as a matter of law that the constitution of the Satte of Alabama prohibits the State from engaging in works of internal improvement, and that by virtue of said inhibition and also by the provisions of complainant's charter hereinbefore set forth the State of Alabama and also the defendant the city as an integral part and agency of said State are both estopped and excluded from establishing and operating the projected water-works system of the city or any other system of water works upon said Three Mile creek or upon any other stream of water whether as assignee of the Stein system and rights or otherwise and from using such system to sell water to the inhabitants of said city or for its own use.

And complainant charges that it is the purpose of said city to use its said projected system both for its own supply of water and to sell water to its inhabitants, and that it will make such use of it unless restrained by the order of this court."

BESTOR & GRAY,
R. H. CLARKE,
Attorneys for Complainant.

Filed by leave of court December 7th, 1899.

RICHARD JONES, *Clerk.*

Complainant's Note of Evidence.

U. S. Circuit Court.

BIENVILLE WATER SUPPLY COMPANY *vs.* CITY OF MOBILE. } No. 209.

Submitted on bill, exhibits to the bill, and evidence.

1. Charter of company, Acts of Ala. 1882–'3, p. 451 *et seq.*
2. Amended charter of company, Acts of Ala. 1884–'5, pages 489–'90.

90 3. Record in case of City of Mobile *vs.* Walter Wood, in U. S. circuit court, denying city's right to own Wood's interest in Stein works, being equity cause No. 208.

4. Case of Bienville Water Supply Company *vs.* City of Mobile, 112 Alabama Report, page 260 *et seq.*

5. Depositions of Walter Wood, Harry S. Hopper, A. W. MacCallum, Wm. C. Pooley, John McGuire, George A. Ketchum.

Attest: RICHARD JONES, *Clerk.*

Filed December 7th, 1899.

RICHARD JONES, *Clerk.*

Testimony on the Part of the Complainant, The Bienville Water Supply Company.

An act to incorporate the Bienville Water Supply Company.

From the Acts of Alabama, 1882–'3, page 451.

Whereas, the inhabitants of the municipality known as the port of Mobile, and the inhabitants of the village of Whistler, in the county of Mobile, are not provided with an adequate supply of water for domestic and municipal purposes; and whereas, it is essential to the public health of the citizens of those towns, and to the protection of their property therein, against conflagration, that an abundant supply of water should be introduced and furnished to said citizens; and whereas, a company of citizens of said county propose to undertake the duty of furnishing such supply to said towns for the public use and benefit:

SECTION 1. Be it enacted by the General Assembly of Alabama, That George A. Ketchum, William H. Pratt, A. C. Danner, Thomas Henry, Sr., Duncan T. Parker, William Butler Duncan, Peter Stark, and their associates and successors be, and the same are hereby made a body politic and corporate, by the name and style

91 of the "Bienville Water Supply Company," and as such corporation they are hereby vested with all the powers and privileges of private corporations under the laws of this State.

SECTION 2. Be it further enacted, That the capital of said corporation shall be five hundred thousand dollars, divided into shares

of one hundred dollars each, and that said corporation may, by purchase or otherwise acquire and own any and all real estate and personal property which may be necessary in order that said corporation may successfully engage in and carry on the business of water supply hereinafter specially declared; and that any insurance, banking, or other corporation existing under the laws of this State, shall have power, and is hereby authorized to subscribe for, own and hold as many shares of the capital stock of the corporation hereby created, as said corporations, by their boards of directors or managers, may see fit to subscribe for.

SECTION 3. Be it further enacted, That the business and affairs of the corporation hereby created, shall be managed by seven directors, to be elected annually by the shareholders of said corporation, at such time and place as may be directed by the by-laws thereof; that one of their number shall be elected by said directors to be president of said corporation, whose powers and duties shall be as their said by-laws declared.

SECTION 4. Be it further enacted, That the officers of said corporation shall be the said president, and a secretary, the latter to be elected by said directors, and such other officers as said corporation, by its directors, may deem to be necessary for the successful management of its business; said directors may require of all officers, except the president, bond, with satisfactory security in such sum as may be prescribed by the by-laws of said corporation, conditioned for the faithful performance of the duties required of them by said by-laws and resolutions of the board of directors.

SECTION 5. Be it further enacted, That until a board of directors be elected by the shareholders as herein directed, the cor-
92 porators hereinbefore named shall be the board of directors, and may open books in the port of Mobile, and elsewhere, as they may direct, for subscription to the capital stock of said corporation, upon such terms as to payment as said board, by resolution to be placed at the head of the subscription list, may prescribe. When the sum of one hundred thousand dollars ($100,000) has been subscribed, said provisional board of directors shall call a meeting of the subscribers, at such time and place as they may direct. At said meeting the subscribers shall elect a board of directors, to serve one year from that date, and till their successors are elected, and proceed to organize said corporation. Upon filing with the judge of probate of Mobile county, a certificate of organization as herein directed, signed by a majority of the corporators in the first section of this act named, said corporation may enter upon and thereafter transact the business hereby authorized.

SECTION 6. Be it further enacted, That said corporation is hereby charged with the duty of introducing into the port of Mobile and the village of Whistler, in Mobile county, such supply of pure water as the domestic, sanitary and municipal wants thereof may require. And for this purpose said corporation is hereby authorized to construct all needed canals and ditches, and by pipes and aqueducts, as may be found best suited for the purpose, to carry into said towns, by such line or route as may be found best, such water as may be

needed, from any point in said county within twenty miles of said port or city of Mobile. In the laying of its pipes and the construction of aqueducts when required, said corporation is hereby authorized to use, free of charge, any and all public roads of the county, and streets of said towns, free of charge; but when its pipes are laid in or under said roads and streets, or its other works completed, said corporation shall, without delay, restore said roads and streets to their original condition for use as public highways and thoroughfares, and for the purpose herein and hereby authorized, and to perform the public duty hereby declared, and by the acceptance
93 of this charter imposed upon it. Said corporation shall have the right to enter upon any land of private persons, and therein and beneath the surface thereof, to lay pipes for the conveyance of said water, and thereafter to repair and maintain the same; but said corporation shall not enter upon any private lot in said towns, without the consent of the owner thereof, and before entering on any private property, must first pay to the owner thereof, such reasonable compensation for its use of said land for the purpose herein declared, as may be agreed upon with said owner, or in case of disagreement, as may be ascertained upon proceedings for that purpose, as directed by law, for the condemnation of private property, or the use thereof, to public use.

SECTION 7. Be it further enacted, That for the supply tubes or pipes leading from the main or large pipes in the streets or roads to the houses or other places where the water is required for use, and for the hydrants and other appliances connected therewith, said corporation shall be entitled to have and demand from the person or persons requiring the water, the reasonable cost thereof, and of fixing and adjusting the same, and said corporation shall have authority to make all needful rules and regulations relating to the supply and use of said water.

SECTION 8. Be it further enacted, That said company may contract with the owner or owners of any land through, or over which its water routes may run, for the purchase of so much of said land, or of the use thereof, as may be requisite for the purposes of said company. If any such land or lands shall belong to a person or persons under age, or *non compos mentis*, or to a trust estate, or to an estate under administration by an executor or administrator, the guardian, trustee, executor or administrator, as the case may be, may contract with the company for the purchase by said corporation of said land or lands, or the use thereof, as may be needed by said corporation, for the purpose authorized by this act, and upon consummation of such contract, may sell and convey said land or
94 lands, or the use thereof, to said corporation. If said corporation cannot agree with the owners or the parties authorized to sell the property desired to be acquired, then said corporation may proceed to obtain, and may acquire the property or interest so desired, in the mode prescribed by law for the taking of private property for the use of other persons or the public.

SECTION 9. Be it further enacted, That the said corporation hereby created is hereby invested with all the rights and powers, which by

law or contract *was* vested in the late municipal corporation, known as "the mayor, aldermen and common council of the city of Mobile," by redemption, purchase or otherwise to acquire from any and all other persons, corporations, or associations whatever, any and all property and rights by such person or persons, corporations or associations, held under any former contract or law, for the introduction and supply of water into the city of Mobile, or the inhabitants thereof, and for such purpose, said Bienville Water Supply Company shall be held and taken to be the assignee of the said "mayor, aldermen and common council of the city of Mobile," and may proceed to assert said rights, and exercise said powers thus assigned, the same as could have been done by the municipal corporation aforesaid; and for this purpose the commissioners of Mobile, appointed under and by virtue of "An act to vacate and annul the charter and dissolve the corporation of the city of Mobile," approved February 11th, 1879, are hereby authorized, on the demand of said corporation, to release to said corporation all the rights of said late city of Mobile in and to such right of redemption, purchase or other acquisition of such property or rights.

SECTION 10. Be it further enacted, That said Bienville Water Supply Company, be and is hereby authorized to acquire by contract with any person or persons, corporation, company or association, claiming any right to supply the port or city of Mobile or the inhabitants thereof with water, such right or rights as he or they may
95 have in the premises, and the property owned and used in connection therewith, and pay therefor such amount of money as may be agreed upon, or such as may be agreed upon in the stock of the said supply company; and in case of failure by contract to obtain such right and property, then said corporation hereby created, may proceed as directed by law, for the condemnation and the taking of private property for public use, to obtain the same for the purpose of the public use and benefit herein declared of furnishing the port of Mobile, and the village of Whistler, and the inhabitants thereof, with an adequate supply of water for domestic, sanitary and municipal purposes.

SECTION 11. Be it further enacted, That said corporation shall have and enjoy the exclusive right and privilege of conducting and bringing water from any other source than Three Mile creek, in the county of Mobile, for the supply of said port and village, for the period of twenty years, from the time when said water shall have been brought into, and be ready for distribution, within the corporate limits of said port, and till the municipal authorities of said port and village, if so by law authorized, shall purchase the water works and property of said corporation, as hereinafter provided; but said corporation must, within two years from the passage of this act, begin its works, and within four years cause water to be conducted into the port of Mobile, for distribution, from some stream or point as hereinbefore named; and if and when any existing claim to bring water from Three Mile creek has been obtained, then said corporation shall have the exclusive right to supply the port and village aforesaid for the period, and upon the terms aforesaid.

SECTION 12. Be it further enacted, That after the expiration of said period of twenty years, in case the General Assembly of Alabama so authorize, the corporate authorities then existing for the government of the territory now known as the port of Mobile, the said corporate authorities may then purchase the property and rights of said corporation, on such terms as may be agreed
96 upon on a valuation to be made by five referees, two to be appointed by said municipal authorities, two by the Bienville Water Supply Company, and one to be selected by the other four referees, but none of said referees shall be residents of the county of Mobile.

SECTION 13. Be it further enacted, That said corporation, for the purpose of its creation, may borrow money and issue its bonds therefor, and for the payment of the same, may mortgage its property and franchises, on such terms as it may contract, but not at a rate of interest in excess of *the* authorized by the laws of this State.

SECTION 14. Be it further enacted, That said corporation be and the same is hereby authorized to demand and receive compensation for the supply of water it may furnish, at not exceeding the following rates, to be paid by the person receiving the water, and in advance, that is to say, for every family consisting of six persons or less, not more than twenty dollars per annum, and two dollars, per annum, for every person additional, two children under twelve years of age to be estimated as two for one. For retail-grocery stores where liquors are not retailed, twelve dollars per annum, for retail-grocery stores where liquor is retailed, from twenty to fifty dollars per annum; for liquor stores doing the business of drawing off and bottling wines or other liquors, from thirty to seventy five dollars per annum; for stores without families, (and for offices, twelve dollars per annum;) for bath for private families, five dollars per annum; for a horse five dollars per annum; for a buggy or carriage, three dollars per annum; for the use of ships and steamboats, vessels and other water crafts, per hogshead of one hundred and twenty gallons, (50c.) fifty cents per hogshead. Coffee-houses, oyster saloons, confectioneries, manufactories, hotels, taverns, boarding-houses, steam mills, tan yards, brick yards, soda-water stands, livery stables, public baths, public or private fountains, baking, dyeing, scouring and renovating establishments, and other places of business not herein enumerated, may be supplied at an annual charge, according to the quantity of water which may be required, on such
97 terms as may be agreed upon.

SECTION 15. Be it further enacted, That said corporation must, without charge, supply all needed water for the use of municipal buildings and hospitals of said port, and the jail and the court-house of the county, but shall be entitled to have and demand reasonable and proper compensation for all pipes, hydrants and labor necessary to carry the water from the main, passing said buildings to the point where the water is to be used.

SECTION 16. Be it further enacted, That whenever the owners of three-fourths of the improved property of any square in said port, in writing, so demands, said corporation must place on such square

as many fire-plugs as may be demanded, at such rate as may be agreed upon per annum, for each plug, and the payment of the annual compensation, so contracted for, shall be a lien upon the improved property of such square, and be divided among and between the buildings upon such square, in proportion to their respective values, as the same are assessed upon the tax books of said port or city, and the proportion so assessed to said buildings respectively, shall be collected for the use of the corporation, and paid to it by the tax collector of the port or city when he makes collection of the taxes levied for municipal purposes. Said fire-plugs shall be placed upon the street, readily accessible to the firemen for use in case of fire. Said plugs may be opened for the purpose of washing the streets and gutters, when and for such time, as the municipal authorities may, by ordinance direct. For water so used in case of fire, and for washing and sanitary purposes, no additional payment shall be made to said corporation. And the Bienville Water Supply Company, and the municipal authorities of the port or city of Mobile, may contract with each other, on such terms as they can agree upon, for the employment by said company, of apparatus or appliances of their own in connection with said water works for the extinguishment of fires or for other public uses, but the existing police board shall not, by anything in this act contained, be
98 empowered to levy, demand or collect any other or additional taxes, than they are now by law empowered to levy, demand and collect.

SECTION 17. Be it further enacted, That any person who shall wilfully remove, disturb, break, or otherwise injure or damage the water works of said company, or anything appertaining thereto, including the logs, pipes, reservoirs, or other things connected therewith, or remove from, under, or about them, any earth, or other material, or by logs, brush or other things, obstruct or divert therefrom the waters thereof, or of the streams or fountains from which they are supplied or shall wilfully deposit, or cause to be deposited, any unwholesome or offensive substance or matter in the reservoirs or pipes of said company, or in the streams supplying the same, or shall tap or open a communication, or cause the same to be done, into the street pipes or other pipes for the conducting of water, otherwise than by authority of said company, or its lawful agent thereunto authorized, shall, for each such offense, be subject to prosecution in the city court, or the circuit court of Mobile county, and be fined in a sum not exceeding five hundred dollars, and be imprisoned in the county jail or sentenced to hard labor for the county, not exceeding two years, at the discretion of the jury trying the cause, and shall besides, be liable to the company for all damages it may sustain thereby.

Approved February 19th, 1883.
Filed December 7th, 1899.

RICHARD JONES, *Clerk.*

An act to amend the act incorporating the Bienville Water Supply Company.

From the Acts of Alabama, 1884–'5, pages 489–'90.

SECTION 1. Be it enacted by the General Assembly of Alabama, That section 1 of the act to incorporate the Bienville Water Supply Company be, and the same is hereby so amended as to read:

Be it enacted by the General Assembly of Alabama, That George A. Ketchum, Thomas Henry, Wm. Butler Duncan, William J. Hearin, P. Hamilton, Julian W. Whiting, David R. Dunlap, O. F. Cawthon, Dan'l P. Bestor, their associates and successors be, and the same are hereby made a body politic and corporate, by the name and style of the Bienville Water Supply Company, and as such corporation they are hereby vested with all the powers and privileges of private corporations under the laws of this State.

SECTION 2. Be it further enacted, That the fifth section of said act be so amended as to read:

Be it further enacted, That until a board of directors be elected by the shareholders as herein directed, any five of the corporators hereinbefore named, or of their associates, shall be authorized to open books in the port of Mobile, or elsewhere, as they may direct, for subscriptions to the capital stock of said corporation upon such terms as to payment by the subscribers thereof as said five persons may, by resolution, determine, to be placed at the head of the *head of the* subscription list. When the sum of fifty thousand dollars shall have been subscribed, said corporators, who have obtained such subscription, shall call a meeting of the subscribers, at such time and place as they may appoint. At such meeting said subscribers shall elect a board of seven directors to serve one year and until their successors are elected, who shall proceed and organize said corporation, upon filing with the judge of probate of Mobile county a certificate of organization as herein directed, signed by the persons who superintended the subscriptions to the stock, or a majority of them. Said corporation may enter upon, and thereafter transact and carry on the business hereby authorized to be transacted and carried on by said corporation.

SECTION 3. Be it further enacted, That the eleventh section of said act be so amended as to read:

Be it further enacted, That said corporation shall have and enjoy the exclusive right of conducting and bringing water from any point, other than Three Mile creek in the county of Mobile, for the supply of said port of Mobile and village of Whistler, for the period of twenty years from the time when said water shall have been brought within the limits of the port of Mobile, and be ready for distribution, and supply to the inhabitants of the port of Mobile, and the houses and dwellings within the limits of said port. And until the municipal authorities of said port and village, if so by law authorized, shall purchase the water works and property of said corporation as hereinafter provided, but said corporation within four years from the passage of this act, must begin

its work, and within six years from the date of the passage of this act, must cause water to be conducted into the port of Mobile from some stream, point or place as hereinbefore named, and if when any existing claim to conduct water into Mobile from Three Mile creek, or any other point without the limits of said port, has been obtained *by this* corporation, then said corporation shall have the exclusive right to supply said port and village, and the inhabitants thereof with water for the period and the term aforesaid. But nothing in this act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company. In making contracts for labor and materials in the construction of works, by this act authorized, said corporation, by its directors, are hereby empowered to stipulate for payment in whole or in part, by the issue of shares of capital stock of said corporation to said contractors, but in no event shall the issue of certificates of capital stock exceed the amount of capital herinbefore authorized.

Approved February 14th, 1885.

Filed December 7th, 1899.

RICHARD JONES, *Clerk.*

101 Record of equity cause No. 208, City of Mobile *versus* Walter Wood, U. S. circuit court, denying city's right to own Wood's interest in Stein water works.

A transcript of the record and proceedings had in a certain cause heretofore pending in the court of chancery for the thirteenth district of the southwestern chancery division of the State of Alabama, wherein The City of Mobile is complainant and Walter Wood is defendant, number 6226.

Original Bill.

Thirteenth District, Southwestern Chancery Division. In Chancery at Mobile, Alabama.

THE CITY OF MOBILE, Complainant,
vs.
WALTER WOOD, Defendant.

To the Honorable William H. Tayloe, chancellor:

1.

Your orator, The City of Mobile, humbly complaining, showeth unto your honor that it is a municipal corporation duly created and existing under and by virtue of the laws of the State of Alabama, and that Walter Wood, the defendant, is a resident of the city of Philadelphia, in the State of Pennsylvania.

2.

Your orator further shows unto your honor that the City of Mobile, a municipal corporation, existing under the laws of Alabama during the years 1840 and 1841, and of which said corporation your orator is the legal and lawful successor, made and entered into a certain contract in writing with one Albert Stein in reference to procuring an abundant supply of pure water for the city of Mobile. Your orator further shows that said contract between said city of Mobile and the said Albert Stein was ratified and confirmed by the General Assembly of Alabama and approved by the governor of Alabama on January 7th, 1841. Your orator further represents that it is the legal and lawful successor of the city of Mobile that was in existance during the years 1840 and 1841, and as such successor is in possession of all of its rights, privileges, and
102 immunities, and also responsible for all its obligations and liabilities, said ratification of said contract entered into between the city of Mobile and Albert Stein by the General Assembly of Alabama and the said contract being as follows:

"An act for the promotion of the health and convenience of the "city of Mobile, by the introduction of a supply of wholesome "water into said city, to be used for domestic purposes and the "extinguishment of fires.

"SECTION 1. Be it enacted by the senate and house of representa- "tives of the State of Alabama, in General Assembly convened, "That, the agreement made and executed by and between the mayor, "aldermen and common council of the city of Mobile, of the one "part, and Albert Stein of the other part, bearing date the 26th day "of December, A. D. 1840, be, and the same is, hereby fully con- "firmed.

"Articles of agreement, made and entered into the 26th day of "December, in the year one thousand, eight hundred, and forty, by "and between the mayor, aldermen, and common council of the "city of Mobile, of the first part, and Albert Stein of the second "part, witnesseth: That the said mayor, aldermen, and common "council of the city of Mobile, for and in consideration of the cove- "nants and agreements hereinafter contained, mentioned, and re- "served on the part of the said Albert Stein, his executors, adminis- "trators, and assigns, to be paid, kept, done, and performed, have "granted, and by these presents do grant unto the said Albert Stein, "his heirs, executors, administrators or assigns, the sole privilege "of supplying the city of Mobile with water from the Three Mile "creek for twenty years from the date of this agreement, as well as "all the advantages and benefits which accrue to the said mayor, "aldermen, and common council, from, by, or under an act of the "legislature of the State of Alabama, entitled 'An act to incorporate "an aqueduct company in the city of Mobile,' passed December 20th, "1820, and all ordinances and resolutions passed by the said mayor "and aldermen of the city of Mobile under and by virtue of the said "act, or by the act of incorporation of the said city of Mobile, and

"the several acts amendatory thereto, which in any way or manner
"relate to the said city water works, or the right to supply
103 "said city with water, as well as all the benefits and advan-
"tages which accrued to the said mayor, aldermen, and com-
"mon council, or the mayor and aldermen of the city of Mobile,
"from, by, or under an act of the legislature of the State of Ala-
"bama, entitled 'An act to incorporate the Mobile Aqueduct Com-
"pany,' passed December 25th, 1837, to have and to hold the above
"mentioned and described privileges, together with all and singu-
"lar the appurtenances unto the same belonging or in anywise ap-
"pertaining, unto the said Albert Stein, his executors, administra-
"tors, and assigns, from the date hereof, for, during, and until the
"full end and term of twenty years thence next ensuing.

"And the said 'mayor, aldermen, and common council of the
"city of Mobile,' for themselves, and their successors in office, here-
"by further covenant and agree, that they will, at the expiration of
"said term of twenty years, (he, the said Albert Stein, his executors,
"administrators, or assigns, delivering up the said water works and
"appurtenances in good order and condition), to pay to him, his
executors, administrators or assigns, their actual value, as deter-
mined by six arbitrators, three to be chosen by the mayor, alder-
men, and common council of the city of Mobile, and three by the
said Albert Stein, his executors, administrators, or assigns; Pro-
vided, that the said arbitrators shall not be members of the corpo-
ration of the city of Mobile. If they agree and so report in writing,
their award shall be binding on the respective parties; but in case
of disagreement, the value of the works shall be left to the watering
committee of the city of Philadelphia, or such committee of the city
of Philadelphia, by whatever name, as may be charged with the
water works of said city, whose decision and award in writing, re-
ported to the mayor, aldermen and common council of the city of
Mobile shall be binding and conclusive. The amount so agreed
upon shall be paid on the same day on which the said award shall
be reported, and the water works and all appurtenances thereunto
belonging, shall be delivered over to the corporation of the city of
Mobile, by the said Albert Stein, his executors, administrators, or
assigns.

"And the said party of the first part hereby covenant and agree
with the said party of the second part, his executors, administrators,
and assigns, that he, his executors, administrators, and as-
104 signs, shall have quiet possession of the said works, during
their erection and after they shall be completed, for the term
of twenty years, and for any further term until the said parties of
the first part, or their successors in office, shall redeem the said
works from the said party of the second part, his heirs, executors,
administrators, or assigns, according to the aforesaid stipulation.

"And further, that they shall, as soon as possible, obtain from the
legislature of the State of Alabama, an act sanctioning this agree-
ment, and the stipulations thereof, as herein contained, with such
other provisions as may be inserted by consent of the said parties.

"And the said mayor, aldermen and common council of the city

of Mobile, for themselves and their successors in office, hereby covenant and agree, (he, the said Albert Stein, his executors, administrators, and assigns, well and truly complying with all and singular the within stipulations and agreements on his part to be done, performed, and complied with), that he, and his executors, administrators, and assigns, shall and may retain quiet possession of the said water works for the said term of twenty years, without let, molestation, or hindrance of the said mayor, aldermen, or common council, or their successors in office, or any person or persons claiming by, through or under them:

"And that the said Albert Stein, his executors, administrators, and assigns shall, during the said term of twenty years, or any further time, until said works are redeemed as above stipulated, have the exclusive privilege of supplying to the citizens and inhabitants of the city of Mobile, water from the water works aforesaid at the sum or price which shall at no time exceed the following rates, to be paid by the persons receiving the water, and payable in advance, to wit:

"First. For every family consisting of six persons, twenty dollars per annum, and two dollars for every person additional, (and persons from one to twelve years of age to be estimated as two for one).

"Second. For retail grocery stores, where liquor is not retailed, twelve dollars per annum.

"Third. For retail grocery stores where liquor is sold in quantities less than one quart, from twenty to fifty dollars per annum.

105 "Fourth. For liquor stores doing the business of drawing off and bottling wines and other liquors, from thirty to seventy-five dollars per annum.

"Fifth. For stores without families, offices, &c., twelve dollars per annum.

"Sixth. For baths for private families, five dollars each per annum.

"Seventh. For a horse, three dollars per annum.

"Eighth. For a carriage, three dollars per annum.

"Ninth. For the use of ships, steamboats and other water craft, per hogshead of one hundred and twenty gallons, fifty cents each.

"Tenth. For coffee-houses, oyster-houses, confectionaries, manufactories, hotels, taverns, boarding-houses, steam mills, tan yards, brick yards, soda shops, livery stables, public baths, bakeries, dyeing scouring and renovating and other establishments not herein enumerated, may be supplied at an annual charge according to the quantity of water that may be required, on such terms as the parties may agree upon; and further the said Albert Stein, his executors, administrators and assigns shall have the power to collect and receive from each and every person — persons who shall take and receive water from the water works aforesaid, the foregoing rates or prices per annum.

"And further, shall have power and authority to conduct the water from any part of the 'Three Mile creek,' so called, so that the same may be good and wholesome, he, the said Albert Stein, his executors, administrators, or assigns, procuring at his or their ex-

pense, the necessary ground for the reservoir, engine and pump house, and that through which the pipes shall pass:

"And the said Albert Stein, for himself and his executors, administrators and assigns, doth hereby covenant and agree, to and with the said party of the first part, and their successors in office, that he will introduce the water into the city of Mobile within the space of two years, from the date hereof, so that the said city of Mobile, and the inhabitants thereof, may at all times be supplied with such quantity of water as may be procured through the said pipes, so far as they are laid:

106 "And further, the said Albert Stein, covenants and agrees, at all times, during the said term of twenty years, to suffer and permit the said mayor, aldermen and common council of the city of Mobile, and their successors in office, to use two fire-plugs, and no more, at all times, within the said city, where the pipes are laid down, as often as may be necessary for washing the gutters of the streets and in case of a conflagration or fire of buildings, as much water as may be necessary from any and all parts of the works:

"And further, the said Albert Stein, covenants and agrees, as aforesaid, to surrender up the said water works and all the appurtenances thereto, to the said mayor, aldermen, and common council, or their successors in office, at the expiration of the said term of twenty years from the date hereof, they, the said mayor, aldermen, and common council, or their successors in office, paying to the said Albert Stein, the value of the works, determined as before mentioned.

"And further, the said Albert Stein, for himself and his executors, administrators, and assigns, doth hereby covenant and agree to and with the said party of the first part, that he will pay or cause to be paid unto the said mayor, aldermen, and common council, or their successors in office, for the pipes which they have on hand, and those laid in the ground which may be found fit for use, the same rates and prices and on the same terms as pipes of the same size and quality may be procured at, to be delivered in Mobile, at the time when he, the said Albert Stein, may take into possession and use the said pipes, now belonging to the said mayor, aldermen and common council.

"And further, it is understood between the contracting parties hereto, that as soon as the water is introduced under this agreement, the present water works shall be abandoned and totally discontinued:

"And further, the said Albert Stein doth hereby covenant and agree to place and so arrange the fire-plugs that there shall be four fire-plugs applicable to each square of ground where the pipes are laid:

"It is further agreed and understood between the parties hereto, that the party of the second part, his executors, administrators or assigns will grant to the corporation, the use of the water for the city hospital and guard-house, free of charge:

107 "It is further agreed and understood between the parties hereto, that if the party of the second part does not introduce the water into the city within two years from the date of this contract, he will forfeit not only the privileges and advantages of this contract, but also all the improvements and the expenses that he may have incurred; the same to inure to the use and benefit of the city:

"It is further agreed and understood between the parties hereto that the party of the second part, hereby covenants and binds himself, his heirs, executors, administrators and assigns, in the penal sum of ten thousand dollars, that he will commence the aforesaid works within one month after obtaining the consent of the legislature of the State of Alabama, to the stipulations, agreements and transfers herein made and contained, and that he will prosecute said works to completion with due speed and diligence.

(Signed) EDWARD HALL, *Mayor.*
[L. S.] ALBERT STEIN,
Per pro. LOUIS TROOST.

Attest: H. P. ENSIGN, *Clerk,*
Per pro. JOHN P. REMY.

"SEC. 2. And be it further enacted, That all the rights, powers, privileges and immunities which were granted to the Mobile Acqueduct Company and to the mayor and aldermen of the city of Mobile by an act of the General Assembly of the State of Alabama, passed on the 20th day of December, 1820, not inconsistent with the terms of the beforementioned agreement, be, and the same are hereby granted, vested in, and confirmed to the said Albert Stein and his assigns.

"SEC. 3. And be it further enacted, That all the rights, powers, privileges and immunities which were granted to the Mobile Acqueduct Company and to the mayor and aldermen of the city of Mobile, by an act of the General Assembly of the State of Alabama, passed on the 25th day of December, 1837, not inconsistent with the terms of the beforementioned agreement, be, and the same are, hereby granted, vested in, and confirmed, to the said Albert Stein, and his assigns.

"SEC. 4. And be it further enacted, That the said Albert Stein and his assigns, by themselves and their agents, shall have full power and authority to use such of the public roads in the
108 county of Mobile as may be in the direct route between the reservoir and the fountain-head of the water works hereby to be erected, and the city of Mobile, for the purposes of laying the pipes for conducting the water into said city free from all charge or claim for damage therefor, provided, that the said Albert Stein and his assigns shall, at their own proper cost and charge, keep and preserve any portion of any of the said public roads so used by them as aforesaid, in full and complete repair so long as the same may be used by them as aforesaid.

"SEC. 5. And be it further enacted, That the said Albert Stein and his assigns, shall have full power and authority to dispose of

any and all of the aforesaid privileges, rights, and immunities, by deed and that the said Albert Stein and his assigns may mortgage the said privileges rights, and immunities, by deed, to all and every person or persons whatsoever, and that the grantee of said Albert Stein and his assigns shall take and enjoy all and every right, privilege, and immunity which the said Albert Stein might or could enjoy by virtue of the aforesaid agreement, and this act, whether the same be granted absolutely or by way of mortgage or pledge.

"Approved January 7th, 1841."

3.

Your orator further represents and shows unto your honor that for the purpose of furthering the object had in view by the General Assembly of Alabama in the passage of the act of January 7th, 1841, set out in full in paragraph 2 of this bill of complaint, to wit, securing an abundant supply of pure and wholesome water for the inhabitants and citizens of the city of Mobile, to be used for domestic purposes and for the extinguishment of fires, the General Assembly of Alabama passed the following act, giving and granting to Albert Stein the use of a sover-ign power of the people residing in the State, to wit, the power of eminent domain. Said act of the General Assembly of Alabama is as follows:

"An act to be entitled An act to amend an act passed the 7th day of January, 1841, entitled An act for the promotion of the health and convenience of the city of Mobile by the introduction into said city of a supply of whole-
109 some water to be used for domestic purposes and for the extinguishment of fires.

"SEC. 1. Be it enacted by the senate and house of representatives of the State of Alabama in General Assembly convened, That it shall be lawful for Albert Stein, his executors, administrators, and assigns, as often as it may be necessary, during the continuance of the privileges granted in the act to which this act is amendatory, to apply at any time to the judge of the county court of Mobile county, or in his absence, to *to* the clerk thereof, for a writ of *ad quod damnum*, which it shall be the duty of the said judge or clerk to issue immediately on such application, directed to the sheriff of Mobile county, commanding him to summon the proprietors of land, at any point on the Bayou Chataugue or Three Mile creek, at which the said Albert Stein, his executors, administrators, or assigns, shall conclude to fix his, or their acqueduct, dams, or reservoir, and also the proprietors of lands above and below the said points on the said bayou and creek, who may claim compensation for damages in consequence of the said works; and also to summon a jury of seven discreet freeholders of the said county to view the said premises at a time not exceeding ten days from the issuing of the writ aforesaid, and the said jury shall examine the banks of the stream above and below the said points, and shall ascertain what amount of damage the said proprietors may sustain by the withdrawal of water or otherwise in consequence of the erection of the said

works. And if the said Albert Stein, his executors, administrators, and assigns, shall require any land for the use of his canal or ditches, or through which to pass his pipes, or for any of the purposes authorized by the act to which this is amendatory, then the said jury shall ascertain the damage that the owner of the said land may sustain in consequence thereof: and it shall be the duty of the sheriff to return the verdict or verdicts of the said jury to the clerk of the county court, as soon as the same shall have been agreed upon by the said jury, or a majority of the same.

"SEC. 2. And be it further enacted, That any of the parties interested, may within ten days after the return of the said inquisition as aforesaid, except to the award of the said jury; and
110 if within that time no exceptions to the said award shall be filed with the clerk of the said county court, then the judge of the said court shall forthwith make an order or decree, which shall vest absolute rights and ownership in the said Albert Stein, his executors, administrators, and assigns, in and to the land, water, privilege, or right, that shall have been condemned by the said jury, and in the said proprietors to the money that shall have been assessed; provided, that if the said Albert Stein shall not fulfill the decree within thirty days from the entry of the same, he shall take no benefit therefrom.

"SEC. 3. And be it further enacted, That if exceptions to the said award be filed as aforesaid, the same shall be heard and decided on by the said judge at the next session of the court for testamentary or orphans' business—or on some day appointed by the said judge, of which all parties interested shall have due notice. And the parties excepting may at the hearing, propound his interest, and exhibit and prove the damage he may sustain, and the said judge may examine and decide upon all matters put in issue, and may upon the application of either party, cause a jury to be empanelled, to determine any issue of fact in the cause, and either party may subpœna witnesses, the cost of whose attendance, as well as the costs of the appeal, shall be borne by the party against whom the judge may decide.

"SEC. 4. And be it further enacted, That it shall be the duty of the sheriff to administer an oath to the said jurors, as in other cases of the execution of the said writ.

"SEC. 5. And be it further enacted, That it shall always be lawful for the said Albert Stein, his executors, administrators, and assigns instead of the writ of *ad quod damnum* allowed by the first section of this act, to agree with the said proprietors, or any of them, upon the appointment of three arbitrators, and to apply to the said judge, or the clerk of the said court in his absence, by petition, stating the land, water, privileges or rights to be condemned, and the willingness of the parties to refer the matter to the said arbitrators, and thereupon the said judge or clerk shall forthwith issue an order to the said arbitrators, stating the matter to them referred,
111 and commanding them to view the premises, and ascertain the damages which may be sustained, within ten days from

the issuance of the said order, and to return their award to the said clerk.

"And it shall be the duty of the said arbitrators to ascertain the damage in the same manner as the jury are directed to do in the first section of this act; and the said arbitrators, or a majority of them shall make their award and return the same to the said clerk within five days after viewing the premises; and the same proceedings shall be had upon the return of the said award, as are directed to be had upon the return of the inquisition in the second and third sections of this act.

"SEC. 6. And be it further enacted, That the said arbitrators, before entering upon the investigation of the matters referred to them, shall take an oath or affirmation impartially to determine the matter to them submitted, according to the equity of the case, to the best of their judgment, without favor or affection, which oath shall be administered by the said clerk, or any justice of the peace.

"Approved, December 25th, 1841."

Your orator shows unto your honor that under the terms of the contract entered into by and between the city of Mobile and Albert Stein, of date December 26th, 1840, and by the terms and provisions of the acts of the General Assembly of Alabama of January 7th, 1841, and December 25th, 1841, it was the manifest intention to impress upon the property known as the Stein or Mobile city water works a public character, and that it is not held by the assigns or heirs of said Stein upon the same terms and conditions as property is ordinarily held.

4.

Your orator further shows that it derives its authority and exists under an act of the General Assembly of Alabama, approved February 6th, 1897 (Acts of Alabama 1896–'7, pages 542–'81), and your orator further shows that under the terms of its said charter of February 6th, 1897, section 21 thereof, the general council of the city of Mobile was authorized "to contract for, build, or purchase, or otherwise acquire, public works, subject to the approval of
112 a majority vote of the citizens of Mobile, at a special election held therefor." Your orator shows that said special election authorized by section 21 of the charter of the city of Mobile was held on August 2nd, 1897, and that said general council of the city of Mobile was, by an overwhelming majority vote of the citizens of Mobile, authorized "to contract for, build, or purchase" a system of water works for the city of Mobile, and your orator alleges that water works are public works within the sense and meaning of its said charter.

5.

Your orator, the legal successor of that corporation known as the city of Mobile, that made and entered into said contract with said Albert Stein, set out in paragraph 2 of this bill of complaint, did, on the 18th day of February, 1898, elect to redeem said Stein or Mobile city water works, as it, said city of Mobile, had the lawful

right to do under the terms and provisions of its said contract with Albert Stein and in accordance with the provisions of the act of January 7th, 1841, of the General Assembly of Alabama, ratifying and confirming said contract theretofore entered into between the city of Mobile and Albert Stein, for the purpose of acquiring a system of water works to be owned and operated by the city of Mobile for the benefit of the people of the city of Mobile, and to that end, on the 18th day of February, 1898, said general council of the city of Mobile appointed Louis Touart, Frank P. Andrews, and J. D. Gurganus, of Mobile county, Alabama, and all of whom were not members of the corporation of city of Mobile, as arbitrators on behalf of the city of Mobile, to value said Mobile city water works. Your orator represents that J. C. Bush, as mayor of the city of Mobile, notified Mr. Louis Stein, the manager in possession and operating said works and who was also one of the owners of said Mobile city water works, in writing, of the appointment of said arbitrators upon the part of the city of Mobile, and requested Mr. Louis Stein to appoint arbitrators upon the part of the Stein or Mobile city water works.

Your orator further represents that J. C. Bush, as mayor of the city of Mobile, also wrote to the defendant Walter Wood, at Philadelphia, Pennsylvania, on the 2nd day of March, 1898, and
113 registered the letter, notifying said Wood of the appointment of said arbitrators upon the part of the city of Mobile to fix the value of the Stein or Mobile city water works, and that said Bush, as mayor of the city of Mobile, received in reply a letter from one A. W. McCallum, of Philadelphia, Pennsylvania, stating that he (McCallum) had opened the said letter addressed to the defendant Walter Wood by the said Bush, as mayor, in the absence of said Walter Wood, and that the said letter so written by the said Bush, as mayor, to the defendant Walter Wood would be immediately forwarded by the said McCallum to the defendant Walter Wood, who, as stated by the said McCallum, was absent at that time, to wit, March 7th, 1898.

Your orator further shows that Louis Stein, the manager in possession of said water works and operating the same, and who was also one of the owners of said water works, notified the defendant Walter Wood, in writing, at Philadelphia, on February 20th, 1898, of the appointment of said arbitrators upon the part of the city of Mobile to value said works, and in said communication requested the defendant Wood to co-operate with him (said Louis Stein) in the appointment of arbitrators upon the part of said water works. Your orator represents that said Louis Stein, the manager of said works, in answer to his communication to Walter Wood, the defendant, received a reply from A. W. McCallum, of Philadelphia, Pennsylvania, under date of March 2nd, 1898, stating that he (McCallum) has forwarded a copy of the said letter of Louis Stein to Walter Wood, who was absent, and said McCallum stated that as Mr. Walter Wood owned a large interest in the Stein water-works property, the writer (McCallum) asked that said Louis Stein should weigh most carefully the question in the absence of Walter Wood,

the defendant. Your orator further shows that, not receiving any definite information from Walter Wood, the defendant, in reference to the appointment of arbitrators upon the part of the owners of the said Stein or Mobile city water works, said Louis Stein, as manager and part owner of said works and representing all of the owners of said works, did, on the 29th day of March, 1898, appoint upon the part of the Mobile city water works three arbitrators, all of whom were not members of the corporation of the city of Mobile, to
114 fix the value of said water works, *three arbitrators, all of whom were not members of the corporation of the city of Mobile, to fix the value of said water works*, said arbitrators being Harvey E. Jones, of Spring Hill, Mobile county, Alabama; A. C. Coles, of State Line, Mississippi, and J. W. Humphrey, of Russell, Mobile county, Alabama.

Your orator further represents and shows unto your honor that the said arbitrators so appointed, as aforesaid, by the general council of the city of Mobile and Louis Stein, manager and part owner of said Mobile city water works, convened in the city hall, in the city of Mobile, Alabama, on the 18th day of April, 1898, and, after being duly sworn according to law, did elect a chairman and secretary of said board of abitrators and did proceed to hear the testimony of witnesses as to the value of said water works, and did also examine and inspect the condition of said water works.

Your orator further represents that, before the said arbitrators representing the city of Mobile and the owners of the Mobile city water works proceeded to organize, J. C. Bush, as mayor of the city of Mobile, handed to said arbitrators the following communication received by him from the law firm of Bestor and Gray, to wit:

"Law offices of Bestor & Gray, Mobile, Ala.

MARCH 30TH, 1898.

Hon. J. C. Bush, mayor of the city of Mobile.

DEAR SIR: We notice in this morning's Register a statement that Mr. Louis Stein had, on behalf of the Stein water works, appointed certain arbitrators to ascertain and fix the value of said works. On behalf of Mr. Walter Wood, the owner of more than one-half interest in said works, we desire to notify you, and through you the city of Mobile, that, as the works are held and owned by the various parties in interest as parties tenants in common, Mr. Wood is not bound nor is the interest in the works owned by him in any manner bound by the decisions of the arbitrators appointed by the city and Mr. Stein.

Mr. Wood is now in Europe, where he has been for several
115 months, and has not as yet selected appraisers.

Will you please let us know, so that we can inform Mr. Wood, whether the city intends to purchase the works at the price fixed by the arbitrators, whatever that price may be, or does the city simply wish to ascertain the amount that it will have to pay should it afterwards conclude to purchase the works?

An early reply is requested.
Yours respectfully,
(Signed) BESTOR & GRAY,
Attorneys for Walter Wood."

Your orator further represents that after said board of arbitrators was duly organized, on April 18th, 1898, it did, by and through its chairman, Louis Touart, write and cause to be delivered to Messrs. Bestor & Gray, the attorneys of Walter Wood, the defendant, on April 18th, 1898, at 1.14 p. m., the following communication:

"Board of arbitrators to ascertain and fix the actual value of the Stein water works.

MOBILE, ALABAMA, *April 18th*, 1898.

Messrs. Bestor & Gray, attorneys for Walter Wood, Esq., of Philadelphia, Pa., Mobile, Alabama.

GENTLEMEN: The arbitrators duly appointed by the mayor and general council of the city of Mobile and those appointed by Mr. Louis Stein, representing himself and all others interested in the Stein water works, met this morning in the council chamber of the city hall for the purpose of assessing the actual value of what is known as the Stein water works, in accordance with the terms of the contract entered into by and between the city of Mobile and Albert Stein in December, 1840, which contract was ratified and confirmed by the General Assembly of Alabama by an act approved January 7th, 1841.

The arbitrators representing the city are Mr. Louis Touart,
116 of Summerville, Mobile county, Alabama; Mr. F. P. Andrews, of Coden, Mobile county, Alabama; Mr. J. D. Gurganus, of Whistler, Mobile county, Alabama. The arbitrators representing Mr. Louis Stein and all others interested in what is known as the Stein water works are Mr. A. C. Cole, of State Line, Mississippi; Mr. Harvey E. Jones, of Spring Hill, Mobile county, Alabama; Mr. J. W. Humphrey, of Russell, Mobile county, Alabama.

As the chairman of the board of arbitrators appointed, as aforesaid, I have been informed by Mr. J. C. Bush, mayor of the city of Mobile, that you, as attorneys of Walter Wood, Esq., of Philadelphia, Pa., have notified him that the interest of Mr. Wood in the Stein water works would not be bound in any manner whatsoever by this arbitration. I now call upon you as attorneys for Mr. Wood to be present on Saturday next, April 23rd, 1898, at ten o'clock a. m., in the council chamber, at the city hall in this city, to produce whatever evidence you may deem advisable as to the actual value of said water works, or to cross-examine witnesses produced by other parties touching the same subject-matter, or take such other course as you may deem proper. It is the purpose of the board of arbitrators to arrive at the actual value of the entire property, rights, and franchises of what is known as the Stein water works.

If your client desires to be heard before this board of arbitration,

he can have that privilege at any time during the sessions of the board.

Yours very truly,

(Signed) LOUIS TOUART,

As Chairman of the Board, etc."

Your orator further shows and alleges that notwithstanding the protestations and denials made by Mr. Walter Wood, the defendant, by and through his attorneys, that both he and his interest in said Stein or Mobile city water works are conclusively bound by said arbitration so made in accordance with the terms of the act of January 7th, 1841, set out in full in paragraph 2 of this bill of complaint.

117 6.

Your orator further represents and shows unto your honor that said arbitrators so appointed, as aforesaid, did meet and hear evidence from time to time as to the value of said Stein or Mobile city water works, and did on May 14th, 1898, make and render the following award, which was in writing, and which was and is as follows:

"THE CITY OF MOBILE
vs.
THE MOBILE CITY WATER WORKS, LOUIS STEIN, FRITZ STEIN, Ella Davenport, E. M. Fulton, and C. R. Colwell, Walter Wood.

Award of Arbitrators.

To all to whom these presents shall come:

Know ye that we, Louis Touart, Frank P. Andrews, J. D. Gurganus, Harvey E. Jones, A. C. Coles, and J. W. Humphries, all of whom are non-residents of the city of Mobile and to whom was submitted, as arbitrators, all the matters and things necessary to be finally settled and adjusted between the city of Mobile and the owners of the Mobile city water works respecting the actual value of all of the property known as the Mobile city water works for the object and purpose of ascertaining and fixing the amount of money said city of Mobile should pay to redeem said property, agreeably to the terms of the contract made by and between said city of Mobile and the late Albert Stein, deceased, dated December 26th, A. D. 1840, and confirmed by an act of the legislature of the State Alabama dated January 7th, 1841:

Now, therefore, know ye that we, the said arbitrators hereinbefore named, having first been duly sworn according to law, and having heard the proofs and allegations of the parties and examined all of the property and all matters in controversy by them submitted, agreeably to said contract or agreement aforesaid, do make this award in writing—

That is to say, we find that the said Mobile city water works owes the following debts and liabilities, which we find and award shall be paid by the said city of Mobile, to wit:

118	To Mrs. L. D. Peabody	$3,286.09
	To Louis Stein	3,040.00
	To Fritz Stein	540.00
	To Ella Davenport	540.00
	To Emma Gordon	540.00
	To Alberta Triplett	540.00
	To State and county taxes	1,886.27
	To special city taxes	647.73
	To city taxes	269.90
	To L. H. Faith	1,841.43
		$13,131.42

And we do further find and award that the actual net value of all the property of said Mobile city water works is thirty-one thousand eight hundred and sixty-eight and $\frac{58}{100}$ dollars ($31,868.58).

We further find and award the cost of this arbitration to be the sum of $292.40, which we tax against the city of Mobile.

We further find and award that the said city of Mobile pay and distribute to the owners of said water-works property the said net actual value of said property, viz., thirty-one thousand eight hundred and sixty-eight and $\frac{58}{100}$ dollars, as follows—that is to say:

To Louis Stein, 12½% or ⅛	$3,983.57
To Fritz Stein, 12½% or ⅛	3,983.57
To Ella Davenport, 12½% or ⅛	3,983.57
To E. M. Fulton and C. R. Colwell, 8.22%	2,619.60
To Walter Wood, 54.28%	17,298.27
	$31,868.58

We further award that upon said city of Mobile paying all of said debts and costs hereinbefore awarded to be paid by it, and upon said city of Mobile paying or tendering to the said respective owners of said property the said several sums of money awarded to each respectively, as aforesaid, being the actual value of said property, that thereupon the said city of Mobile shall at once become entitled to the actual possession of all the said water-works property, known as the Mobile city water works aforesaid, except the books of account; and the said Louis Stein, the present man-
119 ager of said water-works property and now in the possession of the same, shall at once, upon the payment or tender of said money, as aforesaid, turn over all said water-works property, except the books of account, to the city of Mobile or its duly authorized agent to receive such possession from him.

In witness whereof we have hereunto subscribed these presents this the fourteenth day of May, A. D. 1898.

(Signed) LOUIS TOUART,
FRANK P. ANDREWS,
J. D. GURGANUS,
HARVEY E. JONES,
A. C. COLES,
J. W. HUMPHREY,
Arbitrators."

7

Your orator further represents that it complied with said award on said day that it was made by said arbitrators; to wit, on May 14th, 1898, and paid the several owners of said water works named therein the sums of money severally awarded to them, and has received deeds from said parties conveying to your orator all of their right, title, and interest in and to said Mobile city water works, with the exception of Tinsley Jeter, of Bethlehem, Pa., who had acquired the interest supposed to have been vested in E. M. Fulton and C. R. Colwell. Said Jeter accepted the award of the arbitrators when made known to him, and received the amount so awarded from your orator, and made a deed to your orator of his right, title, and interest in said Mobile city water works, and also with the exception of the defendant Walter Wood. As to him, said Walter Wood, your orator shows that it did on the day of said award, to wit, May 14th, 1898, by and through its mayor, J. C. Bush, tender the sum awarded by said arbitrators to Walter Wood, the defendant, in the office of his attorneys, Messrs. Bestor & Gray, on May 14th, 1898, said tender of said amount being made in lawful currency of the United States of America, which said tender was refused and declined by the defendant Walter Wood.

8.

Your orator further represents and shows unto your honor
120 that on said fourteenth day of May, 1898, Louis Stein, the manager of said Stein or Mobile city water works, in accordance with the award of the said arbitrators, turned over the possession and control of said water works to the city of Mobile, turning over the possession of said works to J. C. Bush, as mayor of the city of Mobile.

Your orator represents that it has since said fourteenth day of May, A. D. 1898, remained in possession of said water works and all of the rights, privileges, and immunities belonging thereto, and it is now in possession of the same and is operating the said water works in accordance with the purposes for which said works were built and established.

9.

Your orator further represents and shows unto your honor that said water works are, owing to the growth of said city of Mobile since they were built and established, inadequate to furnish all the pure and wholesome water that is and will be needed for domestic purposes of the citizens of Mobile, the suppression of fires, the flushing of sewers and gutters, etc., and that it is the intention of the city of Mobile to rebuild and enlarge said works as it is authorized to do under its charter.

Your orator further represents that it desires to expend a large amount of money in rebuilding, enlarging, and bettering said Stein or Mobile city water works, which are now in its possession and under its control, so that it will meet all the wants of the city and its inhabitants, and be sufficient to furnish all necessary pure and

wholesome water for domestic purposes, for the suppression of fires, and for a system of sewers, which said system of sewers your orator intends building in the city of Mobile at an early date.

10.

Your orator further represents and shows unto your honor that said defendant, Walter Wood, refuses to accept from your orator the sum of money, to wit, seventeen thousand two hundred and ninety-eight $\frac{27}{100}$ dollars ($17,298.27), so awarded to him by said arbitrators for his interest in said Stein or Mobile city water works, and denies that said award is binding upon him or his interest in said
121 works, and refuses to comply with said award. Your orator shows that said Wood bought his interest in said works, amounting to 54.28 of the whole works, and that the same is held by him subject to the terms and conditions of said contract between the city of Mobile and Albert Stein of December 26th, 1840, and of the act of the General Assembly of Alabama approved January 7th, 1841, which are set out in paragraph two of this bill of complaint. Your orator shows that said Walter Wood bought on May 15th, 1890, and at various times subsequent to said date named 54 and $\frac{28}{100}$ per cent. of the Stein or Mobile city water works, paying for his said interest on a basis of twenty thousand dollars, or less, for the whole of said works, and your orator shows that said Walter Wood took his said interest subject to said contract between the city of Mobile and Albert Stein and the said act of the General Assembly of Alabama of January 7th, 1841, defining the rights, duties, and liabilities of the city of Mobile existing at that time and of which said corporation your orator is the legal and lawful successor, succeeding to all the rights and privileges of said contract.

Prayer.

1. Forasmuch as your orator is without remedy in the premises except in a court of equity, and to the end that the said Walter Wood, who is made a party defendant to this bill, may be brought into court by due process of subpœna according to the rules and practice of this court.

2 That the defendant, Walter Wood, be decreed to specifically perform the award of said arbitrators and receive from your orator said sum of seventeen thousand two hundred and ninety-eight and $\frac{27}{100}$ dollars ($17,298.27) for his interest in said Mobile city water works, which said sum your orator is ready and willing and hereby offers to pay to said Wood in accordance with the award of said arbitrators, and that your honor will decree and order said Walter Wood, the defendant herein, to convey or release to your orator all of his rights, title, and interest in said Mobile city water works, whether the same be legal or equitable.

122 3. That your honor will grant your orator such further or other relief as the nature of the case shall require, and to your honor may seem meet.

And your orator will ever pray, etc.

B. B. BOONE,
City Attorney, &
E. L. RUSSELL,
Solicitors for Complainant.

FOOT-NOTE. The defendant, Walter Wood, is required to answer all of the allegations of paragraphs one to ten, inclusive, but not under oath; oath to such answer is hereby expressly waived.

B. B. BOONE, *City Att'y, &*
E. L. RUSSELL,
Solicitors for Complainant.

STATE OF ALABAMA, }
Mobile County. }

Personally appeared before me, R. L. Maupin, register in chancery for the thirteenth district, southwestern chancery division of the State of Alabama, B. B. Boone, who is personally known to me and by me known to be the city attorney for the city of Mobile, and who, being by me duly sworn, upon oath says that he was authorized to file the above and foregoing bill by resolution of the general council of the city of Mobile, and that Walter Wood, the defendant therein named, is a non-resident of the State of Alabama and is over the age of twenty-one years, and that said Walter Wood resides in the city of Philadelphia, in the State of Pennsylvania.

B. B. BOONE.

Subscribed and sworn to before me this 25 day of June, A. D. 1898.

——,
Register in Chancery.

Filed June 25th, 1898.
R. L. MAUPIN, *Register.*

Order of Publication.

CITY OF MOBILE }
vs. } In Chancery at Mobile, Alabama.
WALTER WOOD. }

REGISTER'S OFFICE, *June 25th*, 1898.

123 In this cause it appearing, from an affidavit on file, that the defendant, Walter Wood, is over the age of twenty-one years and is a non-resident of the State of Alabama and resides in the city of Philadelphia, in the State of Pennsylvania—

It is ordered that he plead, answer, or demur to the allegations of the bill of complaint filed against him in this cause on or before the 26th day of July, 1898, or upon the expiration of thirty days from said date the same will be taken as confessed against him.

It is further ordered that this order be published once a week for four consecutive weeks in the Mobile Daily Herald.

R. L. MAUPIN.

Proof of Publication.

THE STATE OF ALABAMA, }
Mobile County. }

Personally appeared before me, R. L. Maupin, register in chancery for the thirteenth district of the southern chancery division of said State, B. C. Rain, Jr., who, being first duly sworn, states that the annexed publication has been regularly made once a week for four consecutive weeks in the Mobile Daily Herald, a newspaper printed and published in the city of Mobile and State aforesaid.

B. C. RAIN, JR.

Sworn to and subscribed before me this 24 day of Aug., A. D. 1898.

R. L. MAUPIN, *Register.*

Notice to Non-resident.

CITY OF MOBILE }
vs. } In Chancery at Mobile, Alabama.
WALTER WOOD. }

REGISTER'S OFFICE, *June 25th*, 1898.

In this cause it appearing, from an affidavit on file, that the defendant, Walter Wood, is over the age of twenty-one years, and is a non-resident of the State of Alabama, and that he resides in the city of Philadelphia, in the State of Pennsylvania—

It is ordered that he plead, answer, or demur to the allegations of the bill of complaint filed against him in this cause on or before the twenty-sixth day of July, 1898, or upon the expiration
124 of thirty days from said date the same will be taken as confessed against him.

It is further ordered that this order be published once a week for four consecutive weeks in the Mobile Daily Herald.

R. L. MAUPIN, *Register.*

STATE OF ALABAMA, }
Mobile County. }

Thirteenth District, Southwestern Chancery Division.

I, R. L. Maupin, register in chancery for the thirteenth district, southwestern chancery division, State of Alabama, do hereby certify that the publication annexed to the affidavit of B. C. Rain, Jr., was duly made as stated in said affidavit; that a copy of the same was posted up at the court-house door of Mobile county, and that a copy thereof was sent by mail to the defendant, Walter Wood, addressed to him at the city of Philadelphia, in the State of Pennsylvania, the place of his residence, as shown by affidavit in the cause, and that said copies were posted up and sent by mail, as aforesaid, within twenty days from the making of said order.

R. L. MAUPIN, *Register.*

Filed Aug. 24th, 1898.
R. L. MAUPIN, *Register.*

Petition for Removal to United States Circuit Court.

In the Chancery Court for the Thirteenth District of the Southwestern Chancery Division of the State of Alabama.

CITY OF MOBILE, Complainant,
vs.
WALTER WOOD, Defendant.

To the honorable chancery court for the thirteenth district of the southwestern chancery division of the State of Alabama, sitting for the county of Mobile:

Your petitioner, Walter Wood, respectfully shows that he is the only defendant in the above-entitled suit, and that the amount in dispute therein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That said suit is between citizens of different States, the said City of Mobile being the only complainant therein.

That the said City of Mobile was at the time of the com-
125 mencement of said suit and still is a citizen of the State of Alabama, and that your petitioner was then and still is a citizen of the State of Pennsylvania.

Your petitioner offers herewith a bond, with good and sufficient surety, for his entering into the circuit court of the United States for the southern district of Alabama, on the first day of its next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto.

And petitioner prays that said suit be removed to said circuit court, and that this honorable court proceed no further therein except to make the order of removal required by law and to accept the said bond and to cause the record in said suit to be removed into said circuit court of the United States in and for the southern district of Alabama.

BESTOR & GRAY,
R. H. CLARKE,
Attorneys for Walter Wood.

WALTER WOOD,
By R. H. CLARKE, *Att'y-in-fact.*

Filed August 26th, 1898.
R. L. MAUPIN, *Register.*

Bond.

Know all men by these presents that I, Walter Wood, of the city of Philadelphia and State of Pennsylvania, as principal, and we, W. C. Pooley, A. S. Benn, and R. H. Clarke, of the city of Mobile and State of Alabama, as sureties, are held and firmly bound unto the city of Mobile in the penal sum of two hundred & fifty $\frac{00}{100}$ ($250.00) dollars; for the payment whereof, well and truly to be

made, we bind ourselves and each of us, and our and each of our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals this 26th day of August, 1898.

The condition of this obligation is such that whereas the above-bound Walter Wood has petitioned the chancery court of
126 the thirteenth district of the southwestern chancery division of the State of Alabama for the removal of a certain cause therein pending, wherein The City of Mobile is complainant and said Walter Wood is defendant, to the circuit court of the United States of the southern district of Alabama:

Now, if the said Walter Wood shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

WALTER WOOD, [SEAL.]
By R. H. CLARKE,
Att'y-in-fact.
W. C. POOLEY. [SEAL.]
A. S. BENN. [SEAL.]
R. H. CLARKE. [SEAL.]

Filed August 26th, 1898.
R. L. MAUPIN, *Register.*

Order for Removal of Cause to U. S. Circuit Court, &c.

THE CITY OF MOBILE
vs.
WALTER WOOD. } No. 6225. In Chancery at Mobile, Ala.

The defendant in this cause having filed in this court a petition and bond for the removal of the cause from this court to the United States circuit court for the southern district of Alabama, at Mobile, and the allegations of the petition being sufficient, and the bond being hereby approved—

It is ordered that said cause be, and hereby is, removed to the United States circuit court for the southern district of Alabama, at Mobile.

Oct. 17th, 1898.

THOS. H. SMITH, *Chancellor.*

Certificate of Register.

I, Chas. K. Holt, register in chancery for the thirteenth district of the southwestern chancery division of the State of Alabama,
127 hereby certify that the foregoing twenty-six pages and three (3) lines contain a full, true, and complete transcript of the record and proceedings had in a certain cause heretofore pending in the court of chancery for the thirteenth district of the southwestern

chancery division of the State of Alabama, wherein The City of Mobile is complainant and Walter Wood is defendant, as the same remains of record in my office.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at office, at Mobile, Ala., this 22nd day of November, A. D. 1898.

CHAS. K. HOLT,
Register in Chancery.

Filed November 23, 1898.

RICHARD JONES, *Clerk.*

Demurrers to Bill, Case No. 208.

Circuit Court of the United States for the Southern District of Alabama. In Equity.

CITY OF MOBILE, Complainant,
vs.
WALTER WOOD, Defendant. } No. 208.

The defendant, Walter Wood, now comes and demurs to said bill, and for causes and grounds of demurrer sets forth the following:

First. Because said bill does not allege that the money so tendered is deposited in court or deposited or kept good in any way so that the defendant can get it if he so desires.

Second. Because the complainant keeps the money in its possession and under its control, so that it can pay or not pay as it may hereafter find it to its interest to do, and does not place the money in court or anywhere to protect this defendant in case he should accept the same.

Third. Because it is a bill for a specific performance of an executory contract for the sale of property in which the defendant owns more than one-half interest, by the terms of which the price to be paid for the whole is and was to be determined by appraisers to be appointed by the parties interested and to compel defendant to accept a price for his property fixed by arbitrators in whose selection he had no participation or representation.

128 Fourth. Because the bill shows that the right of the city was to make its election with reference to the purchase of the property at a price to be thereafter appointed and named, and that the city did not exercise this option or right in such a way as to bind it to the award or price to be fixed, and until this was done there was no obligation on the part of the defendant to appoint appraisers or to abide by the appraisement made by others, which appraisement the city reserved the right to accept or reject as it afterwards should see fit.

Fifth. Because the bill shows that the defendant, through his attorneys, did, on the 30th day of March, 1898, address a communication to the complainant, through its mayor, asking "whether the city intends to purchase the works at the price fixed by the arbitrators, whatever that price may be, or does the city simply wish to ascertain the amount that it will have to pay should it afterwards

conclude to purchase the works," which question or demand was never answered, but evaded, by said city; wherefore this defendant is not in default in not appointing appraisers to represent his interest in advance of the city's election to purchase at a price to be fixed, and is not bound by any price afterwards fixed by appraisers appointed without his consent, and in which appointment he had no choice, and cannot be compelled to specifically carry out any contract claimed to have been thus closed by a price so fixed by such appraisers which the city could then accept or reject as it saw fit.

Sixth. Because the award made by the appraisers, appointed without the consent or choice of any of them by this defendant, fixed $45,000 as the value of the property, and yet said appraisers only awarded to be paid to the owners of the property $31,868.58 and to this defendant $17,868.58 for his 54.28 interest in said property, which was and is much less than he was entitled to under said award, even if it should be binding on him, so that the amount tendered to him was much less than he was and is entitled to.

Seventh. Because the bill shows that the appraisers assumed to arbitrate and adjust and render an award as to certain accounts and claims against the property, aggregating $13,131.42, none of which claims were a lien on said property, except the taxes,
129 to wit, $2,805.90, and the bill shows that said large sum, to wit, $13,131.42, was paid by the city out of the award made, whereas said claims except the taxes could only be passed upon by the courts, and on which the arbitrators had no power to pass so as to take from this defendant, as a tenant in common of said property, his right to dispute or contest the same, so far as his interest is concerned, and thus deprive this defendant of his proper and fair proportion of said award.

Eighth. Because the bill shows that the appraisers and arbitrators had the power to determine the actual value of the property, and the city had to pay to Albert Stein, his executors, administrators, or assigns, such actual cash value, and such arbitrators had no power to pass upon and the city had no authority to pay any one else any part of said sum so as to bind this defendant, except to the said Albert Stein, his executors, administrators or assigns, or to those who purchased from them, and yet it shows that $13,131.42 was distributed to others than the tenants in common of said property; wherefore it shows that the amount tendered this defendant was not all he was entitled to under said award.

Ninth. Because the bill by its allegations shows that the Stein water works was and is not a corporation nor a partnership, but that it was owned by several parties in undivided parts or parcels, with different undivided interests—that is, that said owners were tenants in common, and hence that as such no one of said tenants in common had the right or authority to bind the interest of the others or create a lien upon the interest of the others for any debt, yet the bill shows that said appraisers appointed by the city and one tenant in common assumed to fix on the whole property certain debts created by one tenant in common and to pay the same as a

part of the value of said property and a part of its award, and to thus deprive this defendant and other tenants in common of their right to contest said claims or any of them as against his or their interests, and has thus deprived this defendant of over $6,880, which he is entitled to under said award as his portion under said award.

Tenth. Because the bill shows that at the expiration of 20 years from the 26th day of December, 1841, to wit, after the 26th day of December, 1861, the city of Mobile had the power to pay the
130 owners of the property its actual cash value as determined by six arbitrators, and yet more than thirty-six years have elapsed since the city has had the right of election on its part so to do; wherefore this defendant claims that by the lapse of so long a time, to wit, over 36 years, the city lost and waived its right of election in thus appraising and buying said property.

Eleventh. Because the bill shows that some part owners of the property refused to appoint arbitrators, refused to arbitrate, and refused to abide by the award made; wherefore it shows that said arbitration made by arbitrators was void and passed no title to the city of Mobile; wherefore it shows that a specific performance of the award cannot be enforced against this part owner, Wood.

Twelfth. Because the bill shows that some of the part owners appointed arbitrators against the consent of other part owners, and that said arbitrators chosen by only one side of the part owners made an award which the other part owners refused to accept or agree to, so it shows that said arbitration and award were void and passed no title to the city of Mobile in defendant's interest and no right to it to force the defendant Wood to transfer his interest in said property.

13th. Because the bill shows such a state of facts as precluded the arbitrators, who pretended to act, from having any powers to pass any title or to render any legal award, and that only a court of equity could then settle the matters of dispute between the parties thereto, and not arbitrators who were not agreed upon by all the parties interested or by any one authorized to represent all the parties interested.

14th. Because a court of equity cannot enforce the specific performance of an award unless all the parties interested agreed upon the arbitrators who attempted to make such award.

Wherefore defendant prays that he may be dismissed out of this court with his costs.

BESTOR & GRAY,
R. H. CLARKE,
Solicitors for Defendant, Walter Wood.

131 We, the undersigned, counsel for the defendant, hereby certify that, in our opinion, the foregoing demurrers are well founded in point of law and that they are not interposed for delay.

D. P. BESTOR.
R. H. CLARKE.

STATE OF PENNA., }
County of Philada. }

Personally came before me, A. P. Rutherford, a notary public in and for the above State and county, Walter Wood, the defendant in this cause, who, being by me duly sworn, affirms and says that the above demurrers are not interposed for delay.

WALTER WOOD.

Subscribed and affirmed before me on this 1st day of December, 1898.

A. P. RUTHERFORD,
Notary Public.

[SEAL.]

Filed Dec. 30, 1898.

RICHARD JONES, *Clerk.*

Opinion of the Court, Case No. 208.

CITY OF MOBILE }
vs. } 208. In Equity. On Demurrers to Bill.
WALTER WOOD. }

B. B. Boone and E. L. Russell, for complainant.
Bestor & Gray and R. H. Clarke, for defendant.

TOULMIN, *District Judge:*

From my view of this case, it is unnecessary for me to consider the many points raised by the demurrer to the bill. One of the questions raised, and which I consider decisive of the case, is whether the submission to arbitration, and the award thereunder mentioned in the bill, is binding on the defendant. It appears from the bill that the defendant, Walter Wood, owns 54.28 interest in the Stein water works; that he did not concur in the appointment of the arbitrators, or consent to the submission, and that he has not, since the award was made, accepted or ratified the same, but has repudiated the award, and refuses to be bound by it. The agreement set out in the bill, and the acts of the legislature of Alabama ratifying and confirming the same, vested Albert Stein, his executors, administrators, and assign, with certain rights and privileges in the nature of a franchise for supplying water to the inhabitants of the city of Mobile, and provided for their procuring the necessary ground for the reservoir, engine, and pump-house, and that through which the pipes should pass, and also that they should be vested with the absolute right and ownership to any land they may acquire for the purpose in the manner provided for in said act. It was also provided that Albert Stein had full power and authority to dispose of any and all of the said privileges, rights, immunities, etc., by deed or otherwise. It appears that the defendant has acquired, by assignment or otherwise, a large interest in the Stein water works, whether they consist of the specified franchise alone, or of land and other tangible property as well. He is a joint or co-owner with the

other owners of such property. Each in respect to the other is seised of the whole, but for the purpose of alienation, forfeiture, and the like, he is seised only of his undivided part or proportion. 4 Kent Comm., 377. An estate in a franchise and an estate in land rest upon the same principle. 3 Kent Comm., 573. Where there are several parties jointly interested in the same matter, those only who submit to an arbitration are bound by the award. One
132 cannot bind the other by a submission, except by special authority. 2 Am. & Eng. Enc. Law (2d ed.), p. 619, and note 1.

A submission to arbitration without the consent of all parties whose interests may be affected by the award is irregular and void. Gregory *v.* Trust Co., 36 Fed., 408. It is not claimed here that the defendant gave any special authority to any one to consent to the submission for him, but it is contended that Louis Stein, one of the defendant's co-owners, who was in the actual custody and management of the water works, consented to the submission, and appointed some of the arbitrators in it. The answer is that a general agent has no authority to submit to arbitration. Special authority for the particular purpose is necessary. 2 Am. & Eng. Enc. Law (2d ed.), 619. It is well settled that one partner has no right, without the concurrence of his copartner, to submit to arbitration partnership matters. Fancher *v.* Furnace Co., 80 Ala., 481; 2 South., 268, and authorities cited. And greater is the reason that an owner of land or of a franchise has no right, without the consent of his co-owner, to submit to arbitration any matter by which the latter's interests in their joint property may be affected, for each is seised only of his undivided part and proportion, and, being so seised, has no right to bind or affect the other's part or proportion. An arbitrator is a person selected by the mutual consent of the parties to determine the matter in controversy between them. 2 Am. & Eng. Enc. Law (2d ed.), 633. There was no mutual consent of the city of Mobile and the defendant to select arbitrators to determine any matter between them. This is admitted by the bill; but it is sought to bind the defendant by the action of his co-owner and manager of the water works. This, in my opinion, cannot be done. The objections based on defendant's want of consent to the submission and failure to concur in the appointment of arbitrators is fatal to the award. Montgomery Gaslight Co. *v.* City of Montgomery, 87 Ala., 251; 6 South., 113.

Again, the power of the arbitrators was limited to the precise question submitted, and that, under the original agreement, was to assess the actual value of the water works. 2 Am. & Eng. Enc. Law (2d ed.), 671, and note 1. They could not lawfully go beyond the terms of the submission in order to do general justice. *Id.*, 672, and note 1. They went beyond, and undertook to adjust and pay certain debts or obligations of the water works. This was beyond their power. If the arbitrators exceed the powers conferred on them, it will render their award void, unless the excess can be separated from the part which is within the submission. *Id.*, 669. When the part of the award which is bad is not so clearly sep-

arable from the rest that it cannot be seen that the good part is not affected by the invalid part, then the award will be void in toto. *Id.*, 746, note 1. Such, it seems to me, is the case here. A void award, like a void contract, will not be specifically enforced. 1 Brick. Dig., 692. But it is needless to pursue further discussion of this point. The opinion expressed by me on the first point considered is conclusive of the case, in my view of it. It is therefore ordered, adjudged, and decreed that the demurrer on the 3d, 7th, 9th, 11th, 13th, and 14th grounds set forth be sustained.

Filed this February 11th, 1899.

RICHARD JONES, *Clerk.*

Decrees on Demurrers, Case No. 208.

THE CITY OF MOBILE
vs.
WALTER WOOD. } 208. In Equity.

This cause coming on to be heard on the demurrers to the bill of complaint and the same having been argued by the respective solicitors and duly considered by the court, it is now ordered, adjudged, and decreed by the court that grounds 3, 7, 9, 11, 13, and 14 of said demurrers be, and the same are hereby, sustained, and the complainant is hereby allowed twenty days within which to amend its bill of complaint.

February 11th, A. D. 1899.

HARRY T. TOULMIN, *Judge.*

Filed February 11th, 1899, and entered on the minutes, page 700.

RICHARD JONES, *Clerk.*

133 *Order Dismissing Cause No.* 208.

Circuit Court of the United States for the Southern District of Alabama.

TUESDAY MORNING, *May the 2nd, A. D.* 1899.

Present: The Honorable Harry T. Toulmin, judge, presiding.

Minutes, page 707.

THE CITY OF MOBILE
vs.
WALTER WOOD. } 208. In Equity.

In this cause the complainant declining to amend its bill of complaint, as allowed to do by the order of the court of February 11th, 1899, at the last term of the court, and having paid the costs of the cause, it is now ordered and decreed by the court that the cause be, and the same is hereby, dismissed out of court.

134 BIENVILLE WATER SUPPLY CO.
v.
CITY OF MOBILE.

(Reported in 112th Alabama Reports, page 260 *et seq.*)

Bill in Equity to Enjoin a Water Company from Cutting Off Its Supply of Water.

1. Enforcement of public duty by injunction; contract of water company to furnish water for fire purposes.—Where by its charter a city is charged with the duty of supplying water for fire purposes and a water company, with knowledge of such duty, contracts to furnish it, and by its charter consents to be charged with such duty, the water company cannot afterwards summarily shut off the water without making some provision for protection from fires; and a court of equity will enjoin such act, at the instance of the city, even though some incidental embarrassment may result to the strict contractual rights of the parties.
2. Same; same; effect of such relief.—In such cases the proceeding is not strictly one for the specific performance of the contract, but one rather, by the negative means of injunction, to enforce the performance of a public duty.

Appeal from the chancery court of Mobile.

Heard before the Hon. W. H. Tayloe.

The bill in this case was filed by the appellee, The City of Mobile, against The Bienville Water Supply Company on May 26, 1894, and prayed to have the water supply company enjoined from cutting off the water supplied to the city by said water supply company under a contract with the said city and from lowering the pressure thereof. The facts of the case are sufficiently stated in the opinion.

The present appeal is prosecuted from a decree of the chancellor overruling the defendant's demurrer to the bill, and this decree is here assigned as error.

Overall, Bestor & Gray, for appellant.—When the city decided to exercise the right of having forfeited to it the one thousand dollars it immediately terminated the contract. That this is true is readily discernible. The bill had for its object the specific performance of a contract, and yet the
135 city had not put itself in a position to enforce the contract, even if construed as it claims; but this is such a contract as a court of equity will not undertake to enforce. Mutuality of remedy, as well as of obligation, is an essential element of a contract such as will be specifically enforced by a court of equity.

Where the contract is such that it requires the frequent interference of the court for years to keep it in force or to exercise its powers in committing for a violation of its orders the court will not undertake to enforce it or to enjoin for its violation. Iron Age Pub. Co. *v.* W. U. Tel. Co., 83 Ala., 498; Blackwilder *v.* Loceless, 21

Ala., 371; Blanchard *v.* Detroit, &c., R. R. Co., 31 Mich., 43; Bickford *v.* Davis, 11 Fed. Rep., 549; Marble City *v.* Ripley, 10 Wall. 340.

P. J. Hamilton, *contra.*—Construing the act in connection with the duties to the public incident thereto, there was no termination of the contract by reason of the fact that the city sought to make the water company liable for its forfeiture as stipulated in the contract. The law will not permit a man to take advantage of his own wrong, and it will not adopt a construction of a contract which permits it. Wingo *v.* Hardy, 94 Ala., 184.

Even if this was a suit for specific performance the contract should be enforced. It is certain, mutual, involves no discretion, and for its breach damages are inadequate. Pomeroy on Contracts, sec. 165; Waterman on Spec. Perf., secs. 152, 153, note, sec. 721; Columbia Co. *v.* Columbia, 5 Rich. (S. C.), 225; Weale *v.* Water Works, 1 Jac. & Walk., 374; 22 Amer. & Eng. Encyc. of Law, 710, 912, 914, 917, 940; Joy *v.* St. Louis, 138 U. S., 2; Davis *v.* Roberts, 89 Ala., 405. Even when the court would not originally compel specific performance, for example, of personal services involving skill and discretion, "the more reasonable doctrine," says Sommerville, J., is to accomplish the same purpose so far as it can be done by the negative means of injunction. Waterman on Specif. Perf., sec. 2; Iron Age Pub. Co. *v.* W. U. Tel. Co., 83 Ala, 498; Kerr on Injunction, 493, 528, 534.

136 BRICKELL, *C. J.:*

The city of Mobile and the Bienville Water Supply Company, under authority conferred by their respective charters, entered into a contract by which the latter undertook to supply water to the inhabitants of the city for private purposes at fixed rates and to supply to the city itself water for public purposes, including service at fires. The charter of the company, by its sixteenth section, provides for the erection of hydrants upon request of residents of certain localities, to be paid for by taxation, and that other hydrants erected under other conditions shall, with certain other apparatus connected with the fire service, be paid for by the city. It is further provided that the water for this service shall be furnished "free," except as paid for from the sources mentioned. Under these conditions it is evident that the water is actually paid for by the inhabitants of the city.

By the second section of the contract it was provided as follows: "Said Bienville Water Supply Company further agrees to erect or cause to be erected in some suitable place to be agreed upon by the general council of said city, a gauge which shall indicate an average pressure of eighty (80) pounds at the hydrant for every twenty-four hours; failure to maintain such pressure shall abate the price proportionately for the time such failure continues after the expiration of such twenty-four hours. In addition, said water supply company agrees and guarantees to furnish for fire service during the existence of any fire or conflagration at any time within the city within reach of the hydrants, through three hundred feet of

two and one-half inch double leads of hose with one-inch nozzle, six vertical streams of eighty feet each; through same hose, with one and one-quarter inch nozzle, six vertical streams sixty feet each. For failure to render this service at any time during such fires or conflagration, said water supply company hereby agrees to forfeit to the said city, the sum of one thousand dollars, and that thereupon this contract shall immediately cease and terminate: provided, however, that such company shall not be subject to such forfeiture or termination of this contract, if by any reason of any illegal, unlawful or improper interference by parties other than said company, with the pipes, mains, hydrants or machinery of said water supply company, it shall be unable to render the service," &c.

137 The bill is brought by the city of Mobile. It alleges that an extensive conflagration occurred in that city on the night of March 16th, 1894; that hose was attached to hydrants near by, but that with only three streams playing through hose not over three hundred feet long and through nozzles not exceeding one and one-quarter inches the vertical streams furnished failed to reach sixty feet each; that a proper supply was not furnished until after the company's superintendent had ridden eleven miles out to the pump-house and increased the pressure, and that the greater part of the damage had occurred before this was done.

It was alleged that the general council subsequently declared by resolution that the water company had by reason of the alleged breach of contract forfeited to the city the sum of one thousand dollars. Pursuant to this action the city deducted that sum from the monthly instalment next due. The water supply company thereupon directed its attorney to demand payment of the sum declared forfeited, and gave notice to the city that in default of payment it would shut off water used for public purposes. The bill is filed to enjoin this threatened action, and the case is before us on appeal from the decree of the chancellor overruling the demurrers of the defendant.

Treating the case as controlled by the principles applicable to ordinary bills for specific performance, it is insisted by the demurrers, first, that the contract providing, as it does, for the performance of continuous duties extending over a series of years—duties involving personal labor and skill—is not one which a court of equity will superintend or specifically enforce; and, next, that aside from this feature of the case the city itself is not in a position to ask specific performance by reason of its own repudiation of the contract.

1. If the bill be of the character asserted in the first contention it would be wanting in equity and should be dismissed. In Electric Lighting Company of Mobile *v.* Mobile & Spring Hill Railway Company, 109 Ala., 190, we held and we now repeat that the "general doctrine is that a court of equity will decree specific performance only when it can dispose of the matter in controversy by a decree capable of present performance. It will not decree a party to perform continuous duty extending over a series of years,

138 but will leave the aggrieved party to his remedies at law;" but we do not understand it to be the purpose or prayer o

the present bill that the court should assume to specifically enforce during the continuance of the contract the mutual duties resting upon the parties by reason of their contractual relations. It alleges, it is true, the existence of the contract and its breach by the defendant, but it is fairly deducible from the pleading that these averments are by way of inducement only a statement of successive occurrences leading up to the final act—the threatened shutting off by the defendant of all water for public purposes.

The abstracts furnished are not full or precise in the statement of the case. They were doubtless prepared on the assumption that they would be amplified by reference to the transcript. This under our construction of our rule we are not at liberty to do. O'Neal v. Simonton, 109 Ala., 369.

If the bill is broader in its prayer for relief than we have construed it to be, it seeks more extended relief than can be decreed; but regarding it as filed solely for the purpose of preventing such injury to the public as might arise if the water company should shut off the water, it is not open to the objection urged. The duty of furnishing water for the extinguishment of fires is one which might well attach to the municipality without being specially imposed. 1 Dillon Munic. Corp. (3d ed.), 143, 146. But here it is expressly enjoined by charter. Acts 1886–987, p. 223. The defendant contracted with the city not only with full knowledge of this duty to the public, but by its own charter, in consideration of valuable public franchises, it consented to be "charged with the duty of introducing (into the city) such supply of pure water as the domestic, sanitary, and municipal wants thereof may require." We have shown with respect to the water to be furnished for fire service and sanitary purposes that while nominally no charge was to be made, the company was indirectly compensated for it, and it may be that when its obligations are measured by strictly contractual relations it should not be required to further proceed in the execution of its contract if the other party had wrongfully abandoned it by withholding the agreed compensation.

139 But the company also owes a duty to the public. Neither it nor the city would be permitted, summarily and without making some other provision for the safety of the public, to shut off the water. We judicially know that contracts of this character once entered upon become in a sense perpetual. They may contain provisions for forfeiture or for expiration by limitation; but from their very character there is expectation, if not assurance, that so inseparable and necessary an adjunct of municipal existence will be carried forward by some one, if not by the original projectors. Changes may and do take place; but where such agencies have thus become incorporated into the municipality itself it would be the duty of the court to see that these changes are not so violent or summary as to endanger public or private property.

While the State has no recognized interest in the property of its citizens, its right to appeal to the courts for the protection of the public interest is well settled. Att'y Gen. *ex.* Jamaica Pond Aqueduct Corp., 133 Mass., 361; Coosaw Min. Co., *v.* South Carolina, 144

U. S., 550, 556; Sparhawk *v.* Union Pas. R. Co., 54 Pa., 401; People *v.* Powers, 83 Hun., 450; U. S. *v.* Am. Bell Teleph. Co., 128 U. S., 315.

The prevention and abatement of nuisances affecting the health or comfort of the public at the instance of municipalities is also a recognized branch of equitable jurisdiction. 1 Dillon Munic. Corp. (3d ed.), 379; Story Equity Juris., secs. 921, 923, 924; Pom. Eq. Jur., sec. 1349; High on Injunction., secs. 745, 1554.

The duty of the State extends in respect to corporations to a resumption by forfeiture of grants of power which have been abused to the detriment of the public. Can it be that the State may not prevent by injunction a wrong, which if perpetrated would warrant a forfeiture? And if such a duty rests upon the State, why on like principle should it not also devolve upon the municipality charged with the protection of the lives and property of its inhabitants? In cases like the present some way can doubtless always be found to protect the rights of the public without invading or infringing the contractual rights of the parties; but if cases should arise where all these rights in their fullness could not be protected, the
140 rights of the public, in view of which the contract was made and in consideration of which valuable franchises have been accorded, should not be defeated because of incidental embarrassment to some extent of the rights of parties to the contract. In such cases the proceeding is not strictly one for specific performance of the contract, but is one rather by the negative means of injunction of enforcing the performance of a public duty. Iron Age *v.* Western Union Tel. Co., 83 Ala., 498, 508.

If the city may not adopt this remedy it is without any remedy. If, pursuant to the notice given, the company should shut off its water supply and damage should result, no matter how extended, it is settled that neither the city nor the owners of private property injured by the breach of public duty could maintain an action against the company. Moundsville *v.* Ohio River R. Co., 20 Lawyers' Rep. Ann., 161. On the other hand, if the city has wrongfully declared the forfeiture the courts are open to the company to have that fact judicially determined and secure the full measure of its rights. It cannot be permitted, however, to enforce its construction of the contract by way of reprisal fraught with such dangerous consequences to the public.

What we have said renders it unnecessary, if not improper, to determine other questions presented by the demurrers. We remark, in conclusion, that under the allegations of the bill the final decree should go no further than to enjoin the threatened action of the defendant.

Affirmed.

Filed Dec'r 7th, 1899.

RICHARD JONES, *Clerk.*

Depositions of Walter Wood, Harry S. Hopper, and A. W. MacCallum.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama.

BIENVILLE WATER SUPPLY CO.
vs.
THE CITY OF MOBILE ET AL. } No. 209.

To Edward F. Hoffman, Philadelphia, Penn., Esqrs., Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you and by these presents do give you or any of you full power and authority to examine Walter Wood, Harry S. Hopper, and A. W. MacCallum, who reside in said Philadel-
141 phia, as witnesses in a cause pending in our said court, wherein Bienville Water Supply Company is plaintiff and The City of Mobile *et al.* are defendants.

And therefore we command you that without delay you do cause the said Walter Wood, Harry S. Hopper, and A. W. MacCallum to come before you, and then and there examine them on oath as witnesses in the cause aforesaid, upon the interrogatories and cross-interrogatories hereto annexed, and that you do take such examination and reduce the same into writing and return the same, annexed to this writ, closed up under your seal, into our said circuit court, with all convenient speed.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, the third day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

Issued the 3d day of June, A. D. 1899.

Attest:
[SEAL.] RICH'D JONES,
Clerk Circuit Court, Southern District of Alabama.

In the U. S. Circuit Court for the Fifth Judicial Circuit and Southern District of Ala. In Equity.

BIENVILLE WATER SUPPLY COMPANY, Complainant,
vs.
THE CITY OF MOBILE and J. C. BUSH, Defendants. } No. 209.

I, Edward P. Hoffman, the commissioner named in the annexed commission, caused to come before me at my office, No. 119 South Fourth street, in the city of Philadelphia, State of Pennsylvania, Walter Wood, Harry S. Hopper, and A. W. MacCallum, witnesses examined by the complainant in the annexed stated cause, and having sworn or affirmed the said witnesses the truth to speak, the whole truth, and nothing but the truth, *and nothing but the truth*, the said witnesses deposed and stated as hereinafter set forth:

Deposition of Walter Wood.

WALTER WOOD, a witness on behalf of the complain-t, examined on this 29th day of June, A. D. 1899, testified as follows:

Direct:

Interrogatory 1. Where do you live, what is your occupation, and how long have you been engaged in such occupation? If you hold any office or position in the Bienville Water Supply Company of Mobile, please state what it is.

To the first direct interrogatory he saith: I live in Philadelphia and have been engaged with the R. D. Wood & Company, manufacturers of cast-iron water pipe, ever since 1868. I am treasurer of the Bienville Water Supply Company.

Interrogatory 2. From what source and from what water company is the city of Mobile and its inhabitants supplied with water? What water company, if any, supplies its public buildings,
142 the court-house, its jails, its public fountains, &c.? Is this supply ample and large in quantity or is it small and weak? What is the quality of water it so supplies?

To the second direct interrogatory he saith: The city of Mobile obtains its water supply from the Stein water works and from the Bienville Water Supply Company. The Bienville Water Supply Company supplies the public buildings, court-house, jails, and public fountains of the city of Mobile. The supply of water from the Bienville Water Supply Company is ample and large; from the Stein water works it is small and weak. The quality of the water supplied by the Bienville Water Supply Company is most excellent, being exceedingly pure. No complaint has ever been made as to its purity or quantity.

Interrogatory 3. About how much or how many gallons of water is used by the city and its inhabitants on an average per day from the Bienville Water Supply Company? What are the means of this supply owned by the water company? When did the water company begin to furnish such water to the city and its inhabitants? Is it or not still doing so? Has or not the water company ever refused to extend its mains and pipes to supply houses or the inhabitants residing in houses abutting the public streets of the city? If so, when and where? Has the city or its authorities ever required or demanded of the water company to extend its pipes and mains and the water company refused so to do? If so, when? If the water company failed so to do, what was the cause or reason?

To the third direct interrogatory he saith: The inhabitants of the city of Mobile use about four million gallons per day on an average, but sometimes during the day it is at a rate of quite double this amount. The Bienville Water Supply Company draws its supply from Clear creek and has the right to attach to all other sources of water in Mobile county, with the exception of Three Mile creek, which it has the right to purchase, and I have been buying since 1891 interest in the Stein water works, with the intention of using

Three Mile creek as additional supply of water. The supply main of the Bienville Water Supply Company crosses this creek, so that all that is necessary to obtain a supply from that source is to erect the necessary machinery. The Bienville Water Supply Company began to supply Mobile with water in 1889 and is now doing
143 so. It has never refused to extend its mains or pipes to supply houses or the inhabitants residing in houses abutting the public streets of the city where there were sufficient water-takers to justify the expense of putting down the pipe. It has at the present time a large quantity of pipe on hand ready to lay for any and all parties who may apply for water service. There have been from time to time demands from inhabitants for the extension of mains through property where there have not been takers. In such instances pipe has not been laid, as the pipe is simply wanted for development for real-estate purposes. Whenever the city authorities ever required or demanded that the water company extend its pipes or mains the water company has always complied therewith. They have never refused to do so at any time. The contract between the water company and the city compels it to lay pipes as the city shall so demand.

Interrogatory 4. Has the Bienville Water Company ever made propositions to the city to enlarge and extend its works? If so, when and how many times? What were the terms proposed by the company to so extend its mains and pipes? How far and how much did complainant so propose to extend its works and on what terms? Did the city or not entertain any of these propositions? What did it do? Has the city ever made any proposition to or offer to the water company to extend its mains or pipes to cover the area or streets now covered by the plant of the water company? If yea, state what it was and what were the terms of such proposition.

To the fourth direct interrogatory he saith: The Bienville Water Supply Company has always held itself ready to enlarge and extend its works as per its contract with the city, and also to extend its works beyond the requirements of said contract. There was a definite proposition to enlarge and extend these works made to the city at a meeting called by the city officials. As to the number of times and the further details of this proposition will be covered by the reply of the general superintendent to this question. The city has never taken any action upon such proposition that I am at present informed of. The city did request that a proposition or offers should be submitted by the water company to extend its mains.

The date of the meeting at which this proposition for enlarge-
144 ment of the Bienville water works was discussed by the city of Mobile and the Bienville Water Company was November, 1898. The city has never taken any action on this proposition. The further details of the proposition will be covered by the reply of the general superintendent.

Interrogatory 5. Has or not the water company complied with its contracts made with the city, copies of which are made Exhibits A & B to the bill? If not, wherein has it failed? Was or was not,

is or is not, this at a large expense to the water company? At about what expense per annum is and has been such expense?

To the fifth direct interrogatory he saith: The Bienville Water Company has always complied with its contract to the city, copies of which are made Exhibits A and B to this bill, and has not failed at any time in doing so. In order to keep the water supply of the city under pressure and the volume which is called for in said contract has entailed a large expense upon the water company, amounting to about $30,000 per annum. It has faithfully and fully fulfilled all the provisions of its contract which called for it to reduce the annual rates which its charter entitled it to charge to the private citizens of Mobile. This reduction called for by the city has been done at a considerable loss to themselves, of not less than $25,000 per annum; so that in carrying out of the contract by the Bienville Water Supply Company and the stipulations thereof there has been entailed upon it an annual expense of about $55,000.

Interrogatory 6. Has or has not the Bienville Water Company a bonded debt? If so, how much is such bonded debt? How many of these bonds are outstanding? What rate of interest do they bear, and how is such interest payable? To whom do these bonds belong, and how are they held? How were they acquired? What were they sold or pledged for and when? What was the money used for which was acquired by their sale or pledge? How are these bonds secured? What was the cost, as near as you can state, of the erection or building of the Bienville water works?

To the sixth direct interrogatory he saith: The Bienville Water Supply Company has a bonded debt of $750,000, all of which are outstanding. They bear six per cent., which is payable on demand at the Farmers' Loan & Trust Company of New York.
145 These bonds are held by the heirs of William Bucknell, having been acquired from S. R. Bullock & Co. as security for the money which was lent by Mr. Bucknell to S. R. Bullock and which was used in building the works of the Bienville Water Company. They were pledged during the years 1887 and 1888. These bonds are secured by a mortgage upon the Bienville Water Supply Company. The cost of erecting and construction of the property of the Bienville Water Supply Company was about $850,000.

Interrogatory 7. How is the interest on these bonds paid? How is the money derived or obtained with which to pay the interest on these bonds? If you say from the income derived from the sale of water to the city and its inhabitants, then state if the company has any other source or property from which the company can make or acquire the funds to pay its interest on its bonded debt except from such sale of water to Mobile and its inhabitants. Can or not the water company pay this interest, except from its income from the city and its inhabitants, for the use of its water? Can the water company meet this interest if it is deprived of such income or a material part thereof? What will be the effect on its income if the city supplies itself and its inhabitants with water from its own proposed water works owned by the city? Can or not the water company keep up its plant and comply with its chartered obligations,

except by getting its money from the city and its inhabitants? What will be the effect in this matter on the Bienville Water Supply Company if the city owns its own works and supplies water to itself and its inhabitants therefrom?

To the seventh direct interrogatory he saith: The interest on the bonds of the Bienville Water Supply Company has never been paid, nor has the company ever earned sufficient money with which to do it. The reduction of rates for private takers agreed upon with the city in the company contract has been the cause of a large part of this deficiency. All the earnings of the company after operating expenses have been used to meet the interest upon the judgment note held by the heirs of William Bucknell as detailed above. If the income of the Bienville Water Supply Company is curtailed or damaged, or in any way interfered with, it will be impossible to maintain the payment of interest. This income is derived
146 from the sale of water to the city and its inhabitants, and the company has no other source than the sale to the city of Mobile and its inhabitants from which to meet the interest on its obligations, and without such income it cannot pay this interest, and if deprived thereof, or any material part thereof, will be unable to meet its charter obligations. If the city owns its own water works and supplies water to itself and its inhabitants therefrom the effect upon the Bienville Water Supply Company will be disastrous in the extreme. The competition that will ensue will very largely reduce its revenue so that it will be unable to comply with its chartered and financial obligations and be unable to keep up its plant in proper condition for operations and supply of inhabitants of the city of Mobile as required by its charter.

Interrogatory 8. Has the water company made any objections to the city building its own water works so as to compete with the Bienville Company in supplying the city and its inhabitants with water? If so, when and where and how has it made such objections and to whom did it make them?

To the eighth direct interrogatory he saith: The Bienville Water Supply Company has always made objections to the city's building its own water works so as to compete with the Bienville Water Supply Company in supplying the city and its inhabitants with water until the city complied with the agreement that they should not do so until they have purchased the works of the Bienville Water Supply Company, as provided for in the charter of the Bienville Water Supply Company. The Bienville Water Supply Company has always claimed that until such was done the city had not the right to supply its inhabitants with water. It began as early as 1891 to raise objections to the city's building water works until the city should submit the question of purchase of the Bienville Water Supply Company's works to arbitration, urging the same before the mayor, members of council, board of aldermen as a whole, and it has repeatedly since that date renewed these objections. It offered to purchase the city's interest in the Stein works immediately upon their being acquired by the city. It filed bills in the city in the courts in 1898 against the city erectings its works. It did the same

again in February, 1899—in fact, in every way, both verbally
147 and in writing and *and* by expostulation and legal proceedings, it has objected to the city's building its own water works unless the works of the company were first bought by the city under the clause of their charter which provides for the city securing the works of the Bienville Water Supply Company, the terms of the charter being that until such time the Bienville Water Supply Company shall have the right to supply the citizens of Mobile with water. A conference was held between the mayor of the city, the board of water commissioners, and the members of this company in 1899, at which was drafted a proposed form of arbitration, which agreement the city has never executed nor carried out.

Interrogatory 9. Did the owners of three-fourths of the improved property being on or near any square ever demand or request the water company to lay pipes or place fire-plugs on or about said square? If so, when and who were they? Did the water company ever refuse to comply with such request? If so, when and to whom was this refusal made? If refused, why was it refused?

To the ninth direct interrogatory he saith: The Bienville Water Supply Company does not know of any case in which in a square of improved property *where* the owners of three-fourths of the improved property have ever demanded or requested the company to lay pipes or water plugs upon said square without such request being complied with, unless they had already laid pipes which were sufficient and capable for such service. We therefore do not know of any refusal having been made by anybody.

Interrogatory 10. Have you ever had any conversations with Mr. J. C. Bush as mayor of Mobile in regard to the issuing of bonds by the city to build its own water works? If so, when and where? What did Mr. Bush say? What did he say was the ability of the city to pay such interest, and how did he say he could pay it? Did he say anything about the city's ability to pay this interest or the coupons on these bonds, whether the water works and sewers made money or not? If so, what did he say and where did these conversations take place?

To the tenth direct interrogatory he saith: I have had a conversation with Mr. J. C. Bush as mayor of Mobile in regard to issuing
a bond for the city to build its own water works. This con-
148 versation was held in the office of D. P. Bestor in Mobile about May, 1898. Mr. Bush stated the city could pay interest on the bonds that would be required to build its own water works from the income of the city. He said that the city would meet such interest by stopping the payments to the Bienville Water Supply Company and by certain economies in the administration of the city's expenses. This, added to the surplus which he claimed the city had at the time of the conversation, would enable the city to pay interest on the bonds; all of which was exclusive of any earnings being derived from the water works contemplated to be erected by the city. This conversation took place in the office of D. P. Bestor in the city of Mobile as above.

Interrogatory 11. Do you know or can you set forth any other

matter or thing which may be a benefit or advantage to the parties at issue in this case, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

To the eleventh direct interrogatory he saith: Replying to this interrogatory as to other matters or things which may be of benefit or advantage to the parties in interest in this cause or that pertain to the subject of the question at issue, I would reply as follows: That the city of Mobile was, prior to 1888, only partially supplied with water by the Stein water works. The supply from these works was unsatisfactory and feeble so as to cause great dissatisfaction among the inhabitants. This dissatisfaction has been of long standing, covering fully twenty-five years. Many and sundry efforts had been made to induce the owners of the Stein water works to enlarge them and make them available to the wants of a growing city. Many discussions took place as to the city building water works of its own, all of which failed, it having been found impossible for the city to construct water works of its own. Efforts were made by the citizens to erect such works, and applications were made to the legislature for charters and amendments to charters between the years 1880 and 1886. There were four distinct applications made for such charters and amendments thereto. It was not until the final amendment to the charter of the Bienville Water Supply Com-
149 pany that parties could be induced to erect works under these charters, although leading citizens were earnest in their endeavors to raise the capital for the expenditure. S. R. Bullock was finally induced to supply money to erect water works for a full and ample supply of water for business, fire, and domestic purposes. These works were tested in 1889. The newspapers of the city were explicit and clear as to the great advantage which these works were to the city and the obligations which the city was under to S. R. Bullock for providing for the protection of the city from fire and furnishing so ample a domestic supply. The citizens considered themselves so especially fortunate in having secured the same through the efforts of Dr. George H. Ketchum, who was the leading citizen of this movement, that they erected a fountain to him in the center of their public square as a commemoration of his part in the completion of the Bienville Water Supply Company's works.

The city when making its contract with the water company for the supply of water for the extinguishment of fires stipulated with the company as to the charges that should be made to the citizens. These charges were much less than those which the company was, by its charter, entitled to make, which reduction of rates contained in its contract with the company has always been carefully observed. This contract was made in 1889, when J. C. Rich was mayor of Mobile.

During 1891 and 1892, when Mr. J. C. Rich was serving another term as mayor, although the Bienville Water Supply Company had faithfully performed all the conditions of its contract and no points of controversy had arisen, the mayor brought forth the suggestion

that the city should take steps to own their own water works, claiming that the rates made by the Bienville Water Supply Company were out of proportion to those charged by other cities, although these rates had been made by the company during his former administration. It was fully demonstrated that the charges were less than charged elsewhere throughout the South and in many of the cities throughout the United States. The company further offered, if the rates were in any way incorrect or oppressive, to submit such questions to competent engineers for adjustment, which offer was not accepted by the city.

150 Since the year 1892, when the question of construction of water works by the city was brought up, the company has always been ready and has repeatedly offered to sell their works to the city in case the city desired to own water works, the price to be fixed by a competent board of arbitration. This tender has been made to the city councils in writing fully five times and has been tendered verbally with steadiness and regularity, so that there never can have been any doubt as to the company's willingness to meet the city's desires as to the solution of the water problem in the fullest and most generous manner.

Cross:

Cross-intg. No. 1. Did the Bienville Water Supply Co. file any suit in any court, State or Federal, seeking to prevent the city of Mobile from building its own water works from November 30th, 1898, until this suit in which you are now testifying was filed in the U. S. circuit court for the southern district of Alabama, at Mobile, on February 21st, 1899?

To the first cross-interrogatory he saith: The Bienville Water Supply Company has filed suits, both in the State and Federal courts, seeking to prevent the city of Mobile from building its own water works. Dates of such suits were September, 1898, in the State court, and in February, 1899, in the Federal court. *That* has been no suit filed in either court between these dates. The suits that were filed in September, 1898, have not been finally decided by the court, as they are now under appeal.

WALTER WOOD.

EDWARD F. HOFFMAN, *Commissioner.*

Deposition of Harry S. Hopper.

HARRY S. HOPPER, a witness on behalf of the complainant, examined on this 29th day of June, A. D. 1899, testified as follows:

Direct:

Interrogatory 1. Where do you live, what is your occupation, and how long have you been engaged in such occupation? If you hold any office or position in the Bienville Water Supply Company of Mobile, please state what it is.

To the first direct interrogatory he saith: I live in the vicinity of the city of Philadelphia; am a banker and broker; my place of

business is 28 South Third street; I have been engaged in business since 1876. I am a director in the Bienville Water Supply Company of Mobile.

151 Interrogatory 2. From what source and from what water company is the city of Mobile and its inhabitants supplied with water? What water company, if any, supplies its public buildings, the court-house, its jails, its public fountains, &c.? Is this supply ample and large in quantity or is it small and weak? What is the quality of water it so supplies?

To the second direct interrogatory he saith: The city of Mobile is supplied with water by the Bienville and Stein water supply. The source from which the Bienville Water Supply Company obtains water to supply the inhabitants of Mobile is Clear creek. The Bienville Water Supply Company supplies the public buildings, court-house, jails, and public fountains, etc., in the city of Mobile. Its supply is ample and large in quantity, and its quality is excellent.

Interrogatory 3. About how much or how many gallons of water is used by the city and its inhabitants on an average per day from the Bienville Water Supply Company? What are the means of this supply owned by the water company? When did the water company begin to furnish such water to the city and its inhabitants? Is it or not still doing so? Has or not the water company ever refused to extend its mains and pipes to supply houses or the inhabitants residing in houses abutting the public streets of the city; if so, when and where? Has the city or its authorities ever required or demanded of the water company to extend its pipes and mains and the water company refused so to do; if so, when? If the water company failed so to do, what was the cause or reason?

To the third direct interrogatory he saith: As to the amount of water used I refer to the superintendent's statement. I have no knowledge how many gallons of water are used by the city of Mobile and its inhabitants on an average per day. The means of supply owned by the water company are its pumping station, reservoir, pipes, hydrants, etc., the said water being obtained from Clear creek, as above stated. The Bienville Water Company began to furnish water to the city and its inhabitants immediately after the completion of its works, about eleven years ago, and it is still doing so. The Bienville Water Supply Company has never, to my knowledge, refused to extend its mains and pipes to supply houses

152 or the inhabitants who reside in houses abutting on the public streets of the city where it has been required to do so under its contract with the city. The Bienville Water Company has refused to extend its pipes to supply houses where it was not required to make such extension under its contract, and the returns were not adequate to pay for the same, the houses being remote from the existing mains of the company. The city or its authorities have never required or demanded the water company to extend its pipes where the company had refused to do so. As above stated, the Bienville Water Company has not refused, but has always fulfilled all its contracts with the city.

Interrogatory 4. Has the Bienville Water Company ever made propositions to the city to enlarge and extend its works; if so, when and how many times? What were the terms proposed by the company to so extend its mains and pipes? How far and how much did complainant so propose to extend its works and on what terms? Did the city or not entertain any of these propositions? What did it do? Has the city ever made any proposition to or offer to the water company to extend its mains or pipes to cover the area or streets not now covered by the plant of the water company? If yea, state what it was and what were the terms of such proposition.

To the fourth direct interrogatory he saith: The Bienville Water Supply Company has made one or more propositions to the city to enlarge and extend its works. I am unable to state of my own knowledge when and how many times. I am unable to state the terms proposed by the company for the extension of its mains and pipes, the details having been referred to the superintendent, excepting that the company has always been ready to meet all the needs of the city and its inhabitants, even offering to procure sewerage on most advantageous terms to the city. I have no further knowledge as to the terms for extension of its works than what I have already stated. The city did not, so far as I know, entertain any of the propositions made to them for the extension of works by the Bienville Water Supply Company. The city agitated the question of building its own works, and, as I understand, proceeded so to do. The city has never, to my knowledge, made any proposition or offer to the Bienville Water Supply Company to extend its mains or pipes to cover the area or streets not now covered by the plant of the Bienville Water Supply Company.

153 Interrogatory 5. Has or not the water company complied with its contracts made with the city, copies of which are made Exhibits "A" & "B" to the bill? If not, wherein has it failed? Was or was not, is or is not, this at a large expense to the water company? At about what expense per annum is and has been such expense?

To the fifth direct interrogatory he saith: The Bienville Water Supply Company has complied in full with its contract made with the city, copies of which are made Exhibits A and B to the bill. It has never failed to comply with its contracts. Complying with its contracts has been a large expense to the water company. As to the exact expense per annum, I have no specific knowledge, only I know in a general way it has cost about $30,000 per year to run these works.

Interrogatory 6. Has or has not the Bienville Water Company a bonded debt? If so, how much is such bonded debt? How many of these bonds are outstanding? What rate of interest do they bear and how is such interest payable? To whom do these bonds belong and how are they held? How were they acquired? What were they sold or pledged for, and when? What was the money used for which was acquired by their sale or pledge? How are these

bonds secured? What was the cost, as near as you can state, of the erection or building of the Bienville water works?

To the sixth interrogatory he saith: The Bienville Water Supply Company has a bonded debt. The bonded debt is $750,000. The bonds bear interest at the rate of six per cent. per annum, payable in United States gold coin, free of taxes, payable semi-annually at the Farmers' Loan and Trust Company of New York. These bonds are pledged, with bonds and stock of other water companies, to the heirs of William Bucknell to secure money loaned for the building of these and other works. These bonds were acquired by direct transfer from the contractors at the time of the payment of the sums loaned for the building of the works, about twelve years ago, and at various dates. The money acquired by the pledge of these bonds was used for the building of the works. These bonds are secured by a first mortgage on the plant, franchises, and other property of the Bienville Water Supply Company. As near as I can state, it cost over $800,000 to build the Bienville Water Supply Company's works.

154 Interrogatory 7. How is the interest on these bonds paid? How is the money derived or obtained with which to pay the interest on these bonds? If you say from the income derived from the sale of water to the city and its inhabitants, then state if the company has any other source or property from which the company can make or acquire the funds to pay its interest on its bonded debt except from such sale of water to Mobile and its inhabitants. Can or not the water company pay this interest except from its income from the city and its inhabitants for the use of its water? Can the water company meet this interest if it is deprived of such income or a material part thereof? What will be the effect on its income if the city supplies itself and its inhabitants with water from its own proposed water works owned by the city? Can or not the water company keep up its plant and comply with its chartered obligations except by getting its money from the city and its inhabitants? What will be the effect in this matter on the Bienville Water Supply Company if the city owns its own works and supplies water to itself and its inhabitants therefrom?

To the seventh direct interrogatory he saith: The interest on these bonds has never been paid in full. All the coupons are still attached to the bonds and all are uncancelled, but, so far as any interest has been paid to the pledgees of the bonds, it has been paid out of the earnings of the company. Whatever money has been obtained to pay the interest due the pledgees has been obtained from the earnings of the company. The Bienville Water Supply Company has no other source of income excepting that derived from the sale of water to the city of Mobile and its inhabitants. The Bienville Water Supply Company cannot pay interest excepting from income derived from the city and its inhabitants for the use of water. The water company cannot meet its interest obligations if it is deprived of such income or a material part thereof. The income of the Bienville Water Supply Company will be seriously impaired if the city supplies itself and its inhabitants from water

through the proposed water works owned by the city. The Bienville Water Company cannot keep up its plant nor comply with its charter obligations except by getting its money from the city
155 and its inhabitants. If the city owns its own water works and supplies water to itself and its inhabitants therefrom, the bonds of the Bienville Water Supply Company will be greatly depreciated and the stock rendered worthless.

Interrogatory 8. Has the water company made any objections to the city building its own water works so as to compete with the Bienville Company in supplying the city and its inhabitants with water? If so, when and where and how has it made such objections and to whom did it make them?

To the eighth direct interrogatory he saith: The Bienville Water Supply Company has made objections to the city building its own water works so as to compete with it in supplying the city and its inhabitants with water. It has made such objections frequently, supplemented by bills in equity filed to enjoin the city from so doing and subsequent bills of like effect, all of which are of record in Mobile county; such legal steps were taken in September, 1898, although protests were made prior to that date.

Interrogatory 9. Did the owners of three-fourths of the improved property being on or near any square ever demand or request the water company to lay pipes or place fire-plugs on or about said square? If so, when and who were they? Did the water company ever refuse to comply with such request? If so, when and to whom was this refusal made? If refused, why was it refused?

To the ninth direct interrogatory he saith: I have no knowledge as to whether the owners of three-fourths of the improved property being on or near any square ever demanded or requested the company to lay pipes or plugs on or about any square and which the company refused to do. The question when and who made it is answered above. The Bienville Water Supply Company has never refused to comply with such request when such request was in accordance with their contract with the city. If such request was refused, it was because it was not in accordance with the contract with the city.

The tenth direct interrogatory being for Mr. Walter Wood only, this witness saith not.

Interrogatory 11. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the
156 parties at issue in this cause or either of them or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

To the eleventh direct interrogatory he saith: In reply to the question whether there are any other matters or things which may be of benefit or advantage to the parties at issue in this cause, I would say that it was extremely difficult to secure the money needed for this enterprise, and it was only on the strongest possible assurances being given to the person advancing the money of the pressing needs of the city for such works, and that everything needed to

secure the money so advanced and make the loan a safe one would be done, that the money was obtained.

Cross:

Cross-intg. No. 1. Did the Bienville Water Supply Co. file any suit in any court, State or Federal, seeking to prevent the city of Mobile from building its own water works from November 30th, 1898, until this suit in which you are now testifying was filed in the U. S. circuit court for the southern district of Alabama, at Mobile, on February 21st, 1899?

To the first cross-interrogatory he saith: In reply I would say the Bienville Water Supply Company has filed suits in the State and Federal courts at Mobile seeking to prevent the city from building its own water works between the dates of September, 1898, and February 21, 1899.

HARRY S. HOPPER.

EDWARD F. HOFFMAN,
Commissioner.

Deposition of A. W. MacCallum.

A. W. MacCallum, a witness on behalf of the complainant, examined on this 29th day of June, A. D. 1899, testified as follows:

Direct:

Interrogatory 1. Where do you live, what is your occupation, and how long have you been engaged in such occupation? If you hold any office or position in the Bienville Water Supply Company of Mobile, please state what it is.

To the first direct interrogatory he saith: I live in Merchantville, N. J. My occupation is that of general manager of a num-
157 ber of water works in different parts of the United States, and I have been so engaged for the past eleven years. I am general manager of the Bienville Water Supply Company of Mobile.

Interrogatory 2. From what source and from what water company is the city of Mobile and its inhabitants supplied with water? What water company, if any, supplies its public buildings—the court-house, its jails, its public fountains, &c.? Is this supply ample and large in quantity or is it small and weak? What is the quality of water it so supplies?

To the second direct interrogatory he saith: The city of Mobile gets its water supply from the Bienville Water Supply Company and from the Stein water works. The Bienville Water Supply Company obtains its supply from what is known as Clear creek, while the Stein works obtains its supply from what is known as the Three Mile creek. The Bienville Water Supply Company supplies all the public buildings, court-house, jails, and public fountains of the city of Mobile. The supply of the Bienville Water Supply Company is ample for its present and future needs. The quality of the water supplied I consider most excellent, as the water is considered by experts to be very pure.

Interrogatory 3. About how much or how many gallons of water is used by the city and its inhabitants on an average per day from the Bienville Water Supply Company? What are the means of this supply owned by the water company? When did the water company begin to furnish such water to the city and its inhabitants? Is it or not still doing so? Has or not the water company ever refused to extend its mains and pipes to supply houses or the inhabitants residing in houses abutting the public streets of the city; if so, when and where? Has the city or its authorities ever required or demanded of the water company to extend its pipes and mains and the water company refused so to do; if so, when? If the water company failed so to do, what was the cause or reason?

To the third direct interrogatory he saith: The Bienville Water Supply Company is supplying at the present time to the city and its inhabitants on an average of three and one-half million gallons of water per day. It began to furnish the present supply to the inhabitants some time in the early part of 1888 and continues
158 to furnish the supply at the present time. The water company has never refused to extend its mains or pipes to supply houses or inhabitants residing within the limits of the city where there were sufficient water-consumers to justify the expense of putting down a main. On the other hand, the company has always stood ready and willing to lay pipes where a fair return on the investment was to be had and complied with the requirements of its contracts and charter.

Interrogatory 4. Has the Bienville Water Company ever made propositions to the city to enlarge and extend its works; if so, when and how many times? What were the terms proposed by the company to so extend its mains and pipes? How far and how much did complainant so propose to extend its works and on what terms? Did the city or not entertain any of these propositions? What did it do? Has the city ever made any proposition to or offer to the water company to extend its mains or pipes to cover the area or streets not now covered by the plant of the water company? If yea, state what it was and what were the terms of such proposition.

To the fourth direct interrogatory he saith: The Bienville Water Supply Company, through myself as its general manager, made a proposition to the mayor, president of the council, and the water and sewerage committee (as appointed by council), who met in company of D. P. Bestor, R. H. Clarke, and George H. Ketchum, the attorneys and president of the water company, and made the following propositions:

1. The company prop-sed to extend its mains over all the streets as contemplated by the city plans. In all I think there were about ninety-five miles.

2. The company prop-sed to furnish water for sewerage purposes at the cost of pumpage.

3. The company was to erect six hundred hydrants on the mains as laid down on the streets of the city, and the hydrant rental was to be reduced from $50 to $25 per annum.

4. The company was to reduce the domestic rates as established by its contract with the city 25 per cent.

5. The reduction of meter rentals was to be from $.50 to $.30 per thousand gallons.

159 In the extension of the mains the company proposed to spend a very large amount of money and give the city officials and inhabitants of the town the benefit of the reduced rates, provided the city would not build its own water works. The above meeting took place in Mobile on November 26th, and through the vice-chairman of the company, John B. Davis, the water and sewerage committee, who had charge of the plans of water and sewers as proposed to be constructed by the city, said, in a letter under date of November 26th, that upon motion duly made and seconded it was unanimously resolved that in view of the fact that the people of Mobile, at a special election duly called and held, had voted for municipal ownership of water works, that the proposition of the Bienville Water Supply Company to reduce its rates for supplying water to the city of Mobile and its inhabitants be not entertained by the water and sewerage committee. At this meeting was Mr. J. C. Bush, the present mayor and the president of the council.

Interrogatory 5. Has or not the water company complied with its contracts made with the city, copies of which are made Exhibits A and B to the bill? If not, wherein has it failed? Was or was not, is or is not, this at a large expense to the water company? At about what expense per annum is and has been such expense?

To the fifth direct interrogatory he saith: The water company had always complied with its contract with the city in every particular, copies of which are annexed A and B to the bill. It has been done at a very large expense to the water company. The operation of the plant last year cost $29,960.09.

Interrogatory 6. Has or has not the Bienville Water Company a bonded debt? If so, how much is such bonded debt? How many of these bonds are outstanding? What rate of interest do they bear and how is such interest payable? To whom do these bonds belong and how are they held? How were they acquired? What were they sold or pledged for and when? What was the money used for which was acquired by their sale or pledge? How are these bonds secured? What was the cost, as nearly as you can state, of the erection or building of the Bienville water works?

To the sixth direct interrogatory he saith: The bonded debt of the Bienville Water Supply Company is $750,000, all of which
160 is outstanding and held as collateral by the Bucknell trustee. The bonds bear 6 per cent. interest, payable semi-annually at the Farmers' Loan and Trust Company of New York. They were acquired by the said Bucknell, I understand, as collateral for a loan in connection with the securities on a number of other water works. These bonds are secured by the first mortgage on the Bienville Water Supply Company's entire property. The cost of the Bienville Water Supply Company up to the first day of June, 1899, was $826,000. The cost of the erection and building of the Bienville water works was about $780,000.

Interrogatory 7. How is the interest on these bonds paid? How is the money derived or obtained with which to pay the interest on these bonds? If you say from the income derived from the sale of water to the city and its inhabitants, then state if the company has any other source or property from which the company can make or acquire the funds to pay its interest on its bonded debt, except from such sale of water to Mobile and its inhabitants? Can or not the water company pay this interest except from its income from the city and its inhabitants for the use of its water? Can the water company meet this interest if it is deprived of such income or a material part thereof? What will be the effect on its income if the city supplies itself and its inhabitants with water from its own proposed water works owned by the city? Can or not the water company keep up its plant and comply with its chartered obligations, except by getting its money from the city and its inhabitants? What will be the effect in this matter on the Bienville Water Supply Company if the city owns its own works and supplies water to itself and its inhabitants therefrom?

To the seventh direct interrogatory he saith: The interest on the bonds of the Bienville Water Company has never been paid in full by the company. The net earnings of the plant are applied on account of interest, but this has never exceeded 2½ per cent. of the interest on the bonds per annum. The company has no other source or property from which it can make or acquire funds to pay interest on the bonded debt, except from the sale of water to the inhabitants of the city of Mobile. The water company cannot pay its interest except from this income from the city and its inhabitants for the use of water, and the water company cannot pay its interest
161 if it is deprived of such income or a material part thereof. If the present income of the company is damaged by loss of the city rental and reduction of the present rates, it will be impossible for it to maintain the present payment of interest on its bonds and maintain its efficiency and comply with its chartered obligations. If the city of Mobile owns its own water works the effect on the Bienville Water Supply Company would be ruinous.

Interrogatory 8. Has the water company made any objections to the city building its own water works so as to compete with the Bienville Company in supplying the city and its inhabitants with water? If so, when and where and how has it made such objections and to whom did it make them?

To the eighth direct interrogatory he saith: The Bienville Water Supply Company has objected from the very beginning of the agitation to the city owning its own water works, believing that it always had the exclusive right to supply water to the city and the inhabitants of Mobile. The company has objected, through its president and treasurer, verbally to the mayor and councilmen in general. It has also made objections by entering suits in the courts of Mobile.

Interrogatory 9. Did the owners of three-fourths of the improved property being on or near any square ever demand or request the water company to lay pipes or place fire-plugs on or about said

square? If so, when and who were they? Did the water company ever refuse to comply with such request? If so, when and to whom was this refusal made? If refused, why was it refused?

To the ninth direct interrogatory he saith: To the best of my knowledge, the company has never had a petition signed by three-fourths of the owners of any improved property to make extensions for water in the city of Mobile, but, on the other hand, the company has always stood ready and willing to make extensions where there was a fair return for the investment and has on hand about one mile of pipe to be used for the purpose of running into said streets where the city does not demand fire protection to meet the demand of its patrons.

Interrogatory 11. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in ques-
162 tion in this cause? If yea, set forth the same fully and at large in your answer.

To the eleventh direct interrogatory he saith: Before building the Bienville Water Supply Company's plant a sense of insecurity pervaded the city of Mobile, for protection against fire was not vouchsafed by the water supply or the power of the Stein water works. Insurance was a heavy tax on business and property. The city, under its charter and its contract with the Stein water works, had the right to purchase these works and the preposition was referred to the people, who by their vote refused to buy the *the* works. The great necessities of the situation were removed, however, by the investment of a large amount of capital in the construction and completion of the Bienville Water Supply Company's works, which gave at once an impetus to public improvement, protection against fire (one of the best in the State), a reduction of insurance tax, improved sanitation, and a security and relief which cannot be computed in money value, such as the improvement in property values, a diminished death rate, and a confidence in the city's development. The city authorities made a six years' contract with the Bienville Water Supply Company for the price of fire protection, and afterwards it was extended for six years more, at prices mutually agreeable, and then, without one honest effort to either prolong or renew the existing contract or purchase the Bienville water-supply works, the city builds its own pipe system, which is suggestion of bad faith to vested rights and interest-, which, I think, has not a precedent in the dealings of municipalities with public works, but such is the unfair treatment which the water company has received in its dealings with the city officials. It is extremely unfortunate for the inhabitants and tax-payers of the city of Mobile that the officials do not accept the proposition as made to them in November of the year 1898, for in my judgment the city, after taking the risk of competition with the Bienville Water Supply Company, will find that it cannot furnish itself with water at the rates as contained in the proposition obtained by myself from the company without using

moneys from some other source to meet the expenses of operation and interest on the bonds.

Cross:

Cross-intg. No. 1. Did the Bienville Water Supply Co. file any suit in any court, State or Federal, seeking to prevent the city
163 of Mobile from building its own water works from November 30th, 1898, until this suit in which you are now testifying was filed in the U. S. circuit court for the southern district of Alabama, at Mobile, on February 21st, 1899?

To the first cross-interrogatory he saith: On the 14th day of September the Bienville Water Supply Company filed a bill against the city of Mobile, its mayor and general council, to enjoin it from issuing negotiable bonds to be used and sold to raise money to pay for the building of water works to be owned by it, on the grounds mainly that it had no authority in its charter to issue these bonds. On the 9th day of March, 1899, the Bienville Water Supply Company filed a petition in the probate court to condemn all the Stein water works under the power given it by section 11 of its charter, and on the 21st day of February, 1899, the Bienville Water Supply Company filed two bills in the United States circuit — sitting at Mobile. These bills are No. 209 and 210 on the docket. By bill No. 209 the Bienville Water Supply Company claims the exclusive right to bring water into the city of Mobile from all sources within twenty miles of the city of Mobile, and that any attempt on the part of the city to construct its own water works and bring water into Mobile to compete with the Bienville Water Supply Company was a violation of the contract made by the legislature with the Bienville Water Supply Company under its chartered rights. The other bill of the Bienville Water Company against the city of Mobile charges that the city is violating its contract made with the company to supply it and its inhabitants with water, which contract has about one year to run, expiring about the first day of July, 1900.

Cross-intg. No. 2. Are you connected with the Bienville Water Supply Co.? If so, how? If so, please state whether or not Eight Mile creek, in Mobile county, is the same creek as Clear creek, in said county? Were you not at Montgomery, Alabama, during the session of the General Assembly of Alabama in the month of November, 1898? Were not D. P. Bestor and R. H. Clarke in Montgomery at that time as attorneys of the Bienville Water Supply Co., and did they not make arguments and seek to prevent the passage of certain bills then pending before the General Assembly of Alabama, which, if passed by that body, would authorize the city of Mobile to build and operate its own system of water works?

164 To the second cross-interrogatory he saith: I am connected with the Bienville Water Supply Company as its general manager. I understand that Clear creek and Eight Mile creek are continuous creeks. I was at Montgomery, Alabama, during the general session in the month of November, 1898, and the company was represented at said General Assembly by D. P. Bestor and

R. H. Clarke, who made arguments before the legislature and committee thereof in support of the rights which the Bienville Water Supply Company has had conferred upon it by the preceding legislatures, and who endeavored to secure from the legislature a special commission to investigate certain bills then pending before the General Assembly, which, if passed, would be in derogation of the rights of the Bienville Water Supply Company, and the company contends that the bills then before the General Assembly of Alabama and which were passed by the same do not properly and legally authorize the city to erect its own water works.

A. W. MACCALLUM.

EDWARD F. HOFFMAN,
Commissioner.

Certificate.

I, Edward F. Hoffman, said commissioner, hereby certify that I caused to come before me at my office in the city of Philadelphia, in the State of Pennsylvania, the above-named witnesses, Walter Wood, Harry S. Hopper, and A. W. MacCallum; that they were each duly sworn and examined; that their evidence was taken down by me as near as may be in the language of said witnesses and was read over to them and by them subscribed in my presence; that the identity of the said witnesses is known to me as the same persons named in the interrogatories and the commission annexed; and I further certify that I am not of counsel or kin to either of the parties to the cause, or in any manner interested in the result thereof, as witness my hand and seal this 14 day of July, A. D. 1899.

EDWARD F. HOFFMAN, [SEAL.]
Commissioner.

Filed July 17, 1899, and published November 28, 1899, by order of court.

RICH'D JONES, *Clerk.*

165 *Depositions of William C. Pooley, John McGuire, and George A. Ketchum.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama.

BIENVILLE WATER SUPPLY CO.
vs.
CITY OF MOBILE ET AL. } No. 209.

To Shelton Sims, Esqrs., Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you and by these presents do give you or any of you full power and authority to examine George A. Ketchum, Wm. C. Pooley, and John McGuire as witnesses in a cause pending in

our said court, wherein Bienville Water Supply Company — plaintiff and The City of Mobile and others are defendants.

And therefore we command you or any of you that without delay you do cause the said Geo. A. Ketchum, Wm. C. Pooley, and John McGuire to come before you or either of you and then and there examine them on oath as witnesses in the cause aforesaid upon the interrogatories and cross-interrogatories hereto annexed, and that you or either of you do take such examination and reduce the same into writing and return the same, annexed to this writ, closed up under your seals or the seal of any one of you, into our said circuit court with all convenient speed.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, the 25th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Issued the 25th day of May, A. D. 1899.

Attest: RICH'D JONES,

[SEAL.] *Clerk Circuit Court, Southern District of Alabama.*

THE STATE OF ALABAMA, }
Mobile County. }

U. S. Circuit Court. In Equity.

BIENVILLE WATER SUPPLY CO, Complainant, }
vs. } No. 209.
CITY OF MOBILE ET AL., Defendants. }

166 The depositions of William C. Pooley, John McGuire, and George A. Ketchum, witnesses examined on behalf of the complainant in the above-entitled cause, which is pending in the honorable the United States circuit court for the southern district of Alabama.

The said witnesses appeared before me at the times and places hereinafter named, and after having been first duly sworn by me to speak the truth, the whole truth, and nothing but the truth, did testify and say as follows:

Deposition of William C. Pooley.

Direct:

Interrogatory 1. Where do you live and what is your occupation? Do you hold any office or position in or under The Bienville Water Supply Company, the complainant in this cause? If so, what is it and what are your duties?

In answer to the first interrogatory he saith: I reside in the city of Mobile. I am the local superintendent of the Bienville Water Supply Company; my duties are the care and operation of the plant of the said company.

Interrogatory 2. From what source and from what water company is the city of Mobile and its inhabitants supplied with water?

What water company supplies the city's public buildings—the court-house, the county jail, and the city's public fountains? What kind of supply does the complainant give or render? Is it ample and large in quantity or is it small or weak? What is the quality of the water so supplied?

In answer to the second interrogatory he saith: The source of the water is what is known as "Clear creek," and the company is known as the "Bienville Water Supply Company." The Bienville Water Supply Company supply the public buildings of the city of Mobile with water—the court-house, the county jail, and the public fountains. The complainant gives and renders a bountiful supply of water. The supply is ample and large. Analysis shows this water to be pharmaceutically pure.

Interrogatory 3. What does the plant of the Bienville Water Supply Company consist of? What are its works or resources of supplying water to the city of Mobile and its inhabitants? About how much or how many gallons of water is used by the city
167 and its inhabitants on an average daily which is supplied by the Bienville Water Supply Company? When or about what time did the complainant begin to furnish such water to the city of Mobile and its inhabitants? Is it or not still doing so? Has or not the water company ever refused to extend its mains and pipes so as to supply houses or the inhabitants residing in houses abutting the public streets of the city? If so, when and where, and what was the cause or reason therefor? Has or not the city or the city authorities ever requested or required or demanded of the complainant to extend its pipes or mains on other streets than those already traversed by them? If so, when and to what extent? Did the water company ever refuse to do so? If so, when and for what reason or cause?

To the third interrogatory he saith: The plant of the Bienville Water Supply Company consists of pump station, reservoir, stand pipe, about forty-five miles of mains, and two hundred and eighty-four hydrants. The resource of supplying water to the city of Mobile and its inhabitants is on Clear creek, about ten and one-half miles from the city of Mobile—*i. e.*, the court-house of Mobile. The Bienville Water Supply Company supplies to the city of Mobile and its inhabitants three million two hundred and six thousand and seventy (3,206,070) gallons of water on an average daily—*i. e.*, average through the last four years. I was not in Mobile when this company began to furnish water to the city of Mobile and its inhabitants, but my information is that it commenced to so furnish water in 1888.

This company is still furnishing water to the city of Mobile and its inhabitants. In section 16 of the company's charter it is shown in what manner the company is obligated to make extensions of its mains and pipes, and the company has always stood ready to comply with it; and in addition to that the company has always been willing and have made small extensions of its pipes where the number of consumers would justify it in doing so. The company has never refused to extend except where the revenue would not justify

or where it was not required to do so by its contract with the city. The city has demanded of the complainant to extend its pipes and mains on other streets not previously occupied by it and the company has always complied with these demands. The water works company never refused to comply with these demands.

168 The company has laid something over two miles of pipe in compliance with these demands of the city—that is, since I have been with the company in Mobile.

Interrogatory 4. What is about the proportion of the part supplied by the Bienville Company with pipes and mains so far as population or people are concerned to that not supplied with pipes and mains? Has the Bienville Water Supply Company made any propositions or offers to the city to extend or enlarge its works? What were such offers or propositions? How far and how much did complainant so propose to extend its works and on what terms? What did the city say or do? Did or would the city entertain any of these offers or propositions from the company? Has the city ever made any propositions or offer to the water company in regard to extending its mains or pipes to cover the area not now covered by the plant of the Bienville Water Company? If you answer yes, then state when and what were the terms proposed and when was this.

To the fourth interrogatory he saith: I should say that about one-half of the city of Mobile is supplied with pipes and mains—that is, so far as the population or people are concerned. The Bienville Water Supply Company in 1892 made a proposition or offer to the city of Mobile to extend and enlarge its works. This proposition was to follow the proposed sewerage system then in contemplation by the city of Mobile, which would have necessitated the said extension. The terms of this extension were that the company was to give the city five hundred and twenty-five hydrants for $13,000, the city to pay the cost of the hydrants and to give a reduced rate to the citizens of Mobile—*i. e.*, a minimum rate of five dollars for domestic purposes and of two dollars for each closet, in consideration of which the city was to compel sewerage connections. The company and the city could not agree as to the time when these rates should take effect, as the city wanted them to take effect immediately and Mr. Wood did not want them to take effect until after sewerage was commenced. I do not remember that the city has ever made any proposition to the company in regard to extending its mains or pipes to cover the area not now covered by the plant of the Bienville Water Supply Company.

Interrogatory 5. Has or not the complainant complied with its contract made with the city as to furnishing water? Is or

169 not it still doing so? What is the expense to the complainant for so doing per annum? State this as near as you can. What sources of income has complainant? Has it any other revenue except from the sale of water to the city and its inhabitants? What water does it supply to the city and county free of cost? What would this free water be worth if paid for?

To the fifth interrogatory he saith: The company has complied

with its contract made with the city to furnish water, and is still doing so. I should say that the expense to the complainant for so supplying water is about twenty-five thousand dollars a year. I should have to refer to my books to give the exact expenses of so furnishing water, but this is the average amount for the last three years, and the exact amount of the past year was thirty thousand and eight hundred and eighteen ($30,818) dollars.

The sources of income of the complainant are the fire-hydrants rentals from the city and the hydrant rentals from the citizens of the city of Mobile. It has no other revenue except from the sale of water to the city and its inhabitants. Some four years ago we measured up what the company furnished the city and county free of cost, which was some three hundred and fifty thousand gallons of water per day. I think it would run much higher than that now. At the lowest rates to our largest consumers this water would be worth about thirty-five dollars a day.

Interrogatory 6. If the city should build its own water works and furnish water to itself and its inhabitants, what would be the effect of such action on the income of complainant? Would it materially impair said income or not? Could the complainant make money enough to keep up its plant in good condition if the city should supply itself and its inhabitants with water? Could it pay the interest on its bonds if thus deprived of this part of its revenue?

To the sixth interrogatory he saith: If the city should build its own water works and furnish water to itself and inhabitants it would greatly impair the income of complainant, but to what extent I cannot say; it would materially impair the income. Should the city supply itself and inhabitants with water it is my opinion that the complainant could not make money enough to keep up its plant in good condition and pay the interest on its bonds if deprived of this part of its revenue.

170 Interrogatory 7. Are you acquainted with the Stein system or what is known as the city water works? If so, state in short of what they consist and where they are located. Are these works or not being run by the city of Mobile? Do they or not compete with complainant in furnishing water to the inhabitants of Mobile? State how they so compete. Do they or not decrease the income of complainant? State, if you can, about what is the gross income from these Stein water works. Do they or not keep customers away from the Bienville Water Supply Company?

To the seventh interrogatory he saith: I am not acquainted with the system of the Stein water works any more than an ordinary observer would be. The works are situated on Three Mile creek, at the foot of Spring hill; it consists of the pumping station, two water-wheel pumps and one steam pump, an independent condenser, two boilers, and there is a reservoir that is not in use, and a pipe system to cover something like eighteen miles, with some fire-hydrants. I believe these works are being run by the city of Mobile. These works compete with complainant in furnishing water to the inhabitants of the city of Mobile. They supply water to all who will take t or who desire a low-pressure service. I only know from hearsay

what the gross income of the Stein works are. As much as they can, they keep customers away from the Bienville Water Supply Company.

Interrogatory 8. Where is Three Mile creek located and how far from the Mobile County court-house? Where is Eight Mile creek located and how far from the court-house? Where is Clear creek located and how far from the court-house of the county of Mobile? What kind of water does Clear creek produce or furnish? What kind of water does Red creek furnish or produce? Is not the water in Red creek muddy and red, particularly in wet weather? What makes Eight Mile creek? If you have in your possession any answers from the city in regard to complainant furnishing it with water, please append them to your answers.

To the eighth interrogatory he saith: Three Mile creek is located in Mobile county, and at the point where the pumping station of the *the* Stein water works are located it is about five and three-quarters miles from the court-house in Mobile. Eight Mile creek is located
in Mobile county, and at its nearest point is about seven and
171 three-fourth miles from the court-house. Clear creek is located in the county of Mobile, and at its nearest point is a little over ten miles from the court-house. The analysis of the Clear Creek water shows it to be pharmaceutically pure. In rainy weather the water in Red creek is very much inferior to that of Clear creek and ordinarily it has color in it. I should say that the water-shed in the neighborhood of Clear creek makes Eight Mile creek. I have not in my possession any answers from the city as designated.

Interrogatory 9. Has or not the complainant heretofore objected to the city building its own water works? If you say yea, state when and where and how was this done before the 21st day of February, 1899.

To the ninth interrogatory he saith: The complainant has heretofore objected to the city building its own water works. The complainant first filed a bill to enjoin the city from issuing bonds for the purpose, and subsequently filed two bills in the United States circuit court.

Interrogatory 10. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

To the tenth interrogatory he saith: I do not know and cannot set forth any matters or things called for by direct interrogatory No. 10.

Cross:

Cross-interrogatory No. 1. Is it not a fact that the Stein system of water works is in a delapidated condition; that the water pipes are very old and are *are* much rusted and are weak and not in such condition that they will stand much pressure? Is not the pressure

necessarily put on the Stein pipes very weak or light? Has not the pump at the pumping station of the Stein water works, near the foot of Spring hill, in Mobile county, been in use for many years, and is it not a fact that said pump is of little service in supplying water to the Stein system? How many customers has the Stein water works taken away from the Bienville Water Supply Company since May 14th, 1898, to May 26th, 1899?

To the first cross-interrogatory he saith: I should say that the plant of the Stein water-works system is old and shows extreme neglect, but the pressure-gu*a*ge at the pumping station shows
172 that the pipes can sustain proper pressure, but, on account of the rust in the pipes, causing much friction, the same pressure is not obtained at this end—that is, the city end—of the pipes. I should judge that the pump of the Stein works has been in use for many years. I could not say whether or not it is of little service in supplying water to the Stein system. We have not ascertained where parties obtain their water who have ceased to patronize us.

Cross-interrogatory No. 2. Is it not a fact that Eight Mile creek, in Mobile county, Alabama, is not the same creek as Clear creek, in Mobile county? Is it not a fact that what is known and is Eight Mile creek is formed by the junction of said Clear creek and Red creek, in Mobile county?

To the second cross-interrogatory he saith: Clear creek and Red creek flow togther and appear to be of equal volume and form Eight Mile creek. I do not know which of these former creeks would be considered the proper continuation of Eight Mile creek.

Cross-interrogatory 3. Did the Bienville Water Supply Company, from November 30th, 1898, to February 20th, 1899, both dates inclusive, file any action or suit in any court seeking to prevent the city of Mobile from building the said system of water works it is now actively engaged in building?

To the third cross-interrogatory he saith: I cannot say definitely, but I think it was between the dates mentioned that the Bienville Water Supply Company filed the bill to enjoin the city from issuing the bonds above referred to.

Cross-interrogatory 4. Do not the president and board of directors of the Bienville Water Supply Company reside in the city and county of Mobile, State of Alabama? Is not the office and chief place of business of said company in the city of Mobile?

To the fourth cross-interrogatory he saith: The president and all of the directors of the company, except one, reside in the city and county of Mobile. Its office and chief place of business is in the city and county of Mobile.

Cross-interrogatory 5. Did not M. T. Lewman & Company, the contractors for building the system of water works for the
173 city of Mobile, distribute or cause to be distributed during the months of December, 1898, and January, 1899, upon the streets of the city of Mobile, preparatory to laying the same, hundreds of tons of water pipe? Were not said contractors, M. T. Lewman & Co., actively engaged in laying water pipe in the streets of

the city of Mobile, under their said contract with said city, during the months of January and February, 1899? Had not said M. T. Lewman & Company actually laid about fifteen miles of iron water pipe in the streets of the city of Mobile on the afternoon of February 21st, 1899, the date the bill was filed in this cause?

To the fifth cross-interrogatory he saith: There was water pipe being distributed on the streets of the city of Mobile about the time referred to, but I cannot say what amount. M. T. Lewman and Company were laying pipe during the months of January and February, 1899. I cannot say how much pipe M. T. Lewman and Company has laid in the streets of Mobile on the afternoon of February 21, 1899.

W. C. POOLEY.

Deposition of John McGuire.

Direct:

Interrogatory 1. Where do you live and what is your occupation? Do you hold any office or position in or under The Bienville Water Supply Company, the complainant in this cause? If so, what is it and what are your duties?

To the first direct interrogatory he saith: I reside in the city of Mobile, and I am collector for the Bienville Water Supply Company. My duties are to distribute bills and to collect a larger part of the same.

Interrogatory 2. From what source and from what water company is the city of Mobile and its inhabitants supplied with water? What water company supplies the city's public buildings, the court-house, the county jail, and the city's public fountains? What kind of supply does the complainant give or render? Is it ample and large in quantity or is it small or weak? What is the quality of the water so supplied?

To the second direct interrogatory he saith: The city of Mobile is supplied with water from what was formerly known as the Stein works and the Bienville Water Supply Company.

174 The Bienville Water Supply Company supplies the city's public buildings with water, the court-house, county jail, and the city's public fountains. I cannot say whether or not the Stein Company furnishes any water to the public buildings. My experience is that the water supplied by the complainant is ample and large, and the pressure is kept up to the standard, as far as I know. I look at the register three or four times a day which indicates the pressure. The quality of the water is good.

Interrogatory 3. What does the plant of the Bienville Water Supply Company consist of? What are its works or resources of supplying water to the city of Mobile and its inhabitants? About how much or how many gallons of water is used by the city and its inhabitants, on an average, daily which is supplied by the Bienville Water Supply Company? When or about what time did the complainant begin to furnish such water to the city of Mobile and its inhabitants? Is it or not still doing so? Has or not the water

company ever refused to extend its mains and pipes so as to supply houses or the inhabitants residing in houses abutting the public streets of the city? If so, when and where and what was the cause or reason therefor? Has or not the city or the city authorities ever requested or required or demanded of the complainant to extend its pipes or mains on other streets than those already traversed by them? If so, when and to what extent? Did the water company ever refuse to do so? If so, when and for what reason or cause?

To the third direct interrogatory he saith: To the best of my knowledge the plant of the Bienville Water Supply Company consist- of somewhere between thirty and forty miles of pipe, reservoir, pumping station on Clear creek, two pumping engines, one cottage at the pumping station, and also one cottage at the reservoir station, and the number of plugs I do not know. The works or resources for supplying water to the city of Mobile and its inhabitants are situated on Clear creek. I cannot say how many gallons of water is furnished to the city and inhabitants of Mobile by the company per day.

I cannot say when the company begun to furnish water to the city of Mobile and its inhabitants. It is still furnishing water to the city of Mobile and its inhabitants. I cannot say whether or not the water company has ever refused to extend its mains or
175 pipes so as to supply houses or the inhabitants residing on public streets. I cannot say whether or not the city or city authorities has ever requested or demanded of the water company to extend its pipes or mains on other streets than those already traversed by them.

Interrogatory 4. What is about the proportion of the part supplied by the Bienville Company with pipes and mains, so far as population or people are concerned, to that not supplied with pipes and mains? Has the Bienville Water Supply Company made any propositions or offers to the city to extend or enlarge its work? What were such offers or propositions? How far and how much did complainant so propose to extend its works and on what terms? What did the city say or do? Did or would the city entertain any of these offers or propositions from the company? Has the city ever made any propositions or offer to the water company in regard to extending its mains or pipes to cover the area not now covered by the plant of the Bienville Water Company? If you answer yes, then state when and what were the terms proposed, and when was this?

To the fourth direct interrogatory he saith: I do not know of and cannot answer any of the matters and things therein set forth.

Interrogatory 5. Has or not the complainant complied with its contract made with the city as to furnishing water? Is it or not still doing so? What is the expense to the complainant for so doing per annum? State this as near as you can. What sources of income has complainant? Has it any other revenue except from the sale of water to the city and its inhabitants? What water does it supply to the city and county free of cost? What would this free water be worth if paid for?

To the fifth direct interrogatory he saith: I do not know of any of the matters or things therein set forth, and I cannot answer.

Interrogatory 6. If the city should build its own water works and furnish water to itself and its inhabitants, what would be the effect of such action on the income of complainant? Would it materially impair said income or not? Could the complainant make money enough to keep up its plant in good condition if the city should supply itself and its inhabitants with water? Could it pay the interest on its bonds if thus deprived of this part of its revenue?

176 To the sixth direct interrogatory he saith: I do not know of any of the matters or things set forth in said interrogatory and cannot answer same.

Interrogatory 7. Are you acquainted with the Stein system, or what is known as the city water works? If so, state in short of what they consist and where they are located? Are these works or not being run by the city of Mobile? Do they not compete with complainant in furnishing water to the inhabitants of Mobile? State how they so compete. Do they or not decrease the income of complainant? State, if you can, about what is the gross income from these Stein water works. Do they or not keep customers away from the Bienville Water Supply Company?

To the seventh direct interrogatory he saith: I am acquainted with the Stein water-works system, but not sufficiently well to be able to answer the said interrogatory, except that I can say that they do compete with the Bienville Water Supply Company in furnishing water to the inhabitants of the city of Mobile.

Interrogatory 8. Where is Three Mile creek located and how far from the Mobile county court-house? Where is Eight Mile creek located and how far from the court-house? Where is Clear creek located and how far from the court-house of the county of Mobile? What kind of water does Clear creek produce or furnish? What kind of water does Red creek furnish or produce? Is not the water in Red creek muddy and red, particularly in wet weather? What makes Eight Mile creek? If you have in your possession any answers from the city in regard to complainant furnishing it with water, please append them to your answers.

To the eighth direct interrogatory he saith: All of the creeks mentioned in the said interrogatory are situated in the county of Mobile; I do not know how far from the court-house. The water furnished by Clear creek is pure, but I do now know what kind of water Red creek furnishes. I have always understood that Clear creek and Red creek made Eight Mile creek. I do not know it to be a fact. I have not in my possession any answers from the city of Mobile, as referred to.

Interrogatory 9. Has or not the complainant heretofore objected to the city building its own water works? If you say yes, state when and where, and how was this done before the 21st day of February, 1899?

177 To the ninth direct interrogatory he saith: I do not know of any matters therein set forth and cannot answer.

Interrogatory 10. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

To the tenth direct interrogatory he saith: I do not know and cannot set forth any matters therein referred to.

Cross:

Cross-interrogatory No. 1. Is it not a fact that the Stein system of water works is in a delapidated condition; that the water pipes are very old and are *are* much rusted and are weak and not in such condition that they will stand much pressure? Is not the pressure necessarily put on the Stein pipes very weak or light? Has not the pump at the pumping station of the Stein water works, near the foot of Spring hill, in Mobile county, been in use for many years, and is it not a fact that said pump is of little service in supplying water to the Stein system? How many customers has the Stein water works taken away from the Bienville Water Supply Company since May 14th, 1898, to May 26th, 1899?

To the first cross-interrogatory he saith: I do not know any of the matters therein set forth and cannot answer.

Cross-interrogatory No. 2. Is it not a fact that Eight Mile creek, in Mobile county, Alabama, is not the same creek as Clear creek, in Mobile county? Is it not a fact that what is known as Eight Mile creek is formed by the junction of said Clear creek and Red creek, in Mobile county?

To the second cross-interrogatory he saith: I have always heard that Clear creek and Red creek formed Eight Mile creek, but I do not know this to be a fact.

Cross-interrogatory No. 3. Did the Bienville Water Supply Company from November 30th, 1898, to February 20th, 1899, both dates inclusive, file any action or suit in any court seeking to prevent the city of Mobile from building the said system of water works it is now actively engaged in building?

To the third cross-interrogatory he saith: I do not know of the matters set forth in said interrogatory and cannot answer same.

178 Cross-interrogatory No. 4. Do not the president and board of directors of the Bienville Water Supply Company reside in the city and county of Mobile, State of Alabama? Is not the office and chief place of business of said company in the city of Mobile?

To the fourth cross-interrogatory he saith: I do not know.

Cross-interrogatory No. 5. Did not M. T. Lewman and Company, the contractors for building the system of water works for the city of Mobile, distribute or cause to be distributed during the months of December, 1898, and January, 1899, upon the streets of the city of Mobile, preparatory to laying the same, hundreds of tons of water pipe? Were not said contractors, M. T. Lewman & Co., actively engaged in laying water pipes in the streets of the city of Mobile

under their said contract with said city during the months of January and February, 1899? Had not said M. T. Lewman & Company actually laid about fifteen miles of iron water pipe in the streets of the city of Mobile on the afternoon of February 21st, 1899, the date the bill was filed in this cause?

To the fifth cross-interrogatory he saith: I should say that during the months of December, 1898, and January, 1899, M. T. Lewman & Company distributed upon the streets of the city of Mobile, preparatory to laying the same, a large amount of water pipe. The said firm was actively engaged in laying water pipes in the streets of the city of Mobile during the months of January and February, 1899. I do not know how much pipe the said Lewman and Company had laid on the afternoon of February 21st, 1899.

JOHN McGUIRE.

Deposition of George A. Ketchum.

Interrogatory 1. Where do you live and what is your occupation? Do you hold any office or position in or under The Bienville Water Supply Company, the complainant in this cause? If so, what is it and what are your duties?

To the first direct interrogatory he saith: Live in Mobile, Ala.; am a practicing physician. I am the president of the Bienville Water Supply Company. Duties are principally presiding at the meetings of the board of directors, signing official papers and documents, etc.

Interrogatory 2. From what source and from what water
179 company is the city of Mobile and its inhabitants supplied with water? What water company supplies the city's public buildings, the court-house, the county jail, and the city's public fountains? What kind of supply does the complainant give or render? Is it ample and large in quantity or is it small or weak? What is the quality of the water so supplied?

To the second direct interrogatory he saith: From a stream known as Clear creek. From the Bienville Water Supply Co. The same company supplies the city's public buildings, the court-house, the county jail, and the city's public fountains and flushing streets. An abundant supply of good and wholesome water for all public and private purposes. It is ample and large in quantity. It is pure and wholesome in quality.

Interrogatory 3. What does the plant of the Bienville Water Supply Company consist of? What are its works or resources of supplying water to the city of Mobile and its inhabitants? About how much or how many gallons of water is used by the city and its inhabitants on an average daily which is supplied by the Bienville Water Supply Company? When or about what time did the complainant begin to furnish such water to the city of Mobile and its inhabitants? Is it or not still doing so? Has or not the water company ever refused to extend its mains and pipes so as to supply houses or the inhabitants residing in houses abutting the public streets of the city? If so, when and where and what was the cause

or reason therefor? Has or not the city or the city authorities ever requested or required or demanded of the complainant to extend its pipes or mains on other streets than those already traversed by them? If so, when and to what extent? Did the water company ever refuse to do so? If so, when and for what reason or cause?

To the third direct interrogatory he saith: Pumping station, reservoir, two powerful engines for pumping and distributing, some mains and pipes for conducting the water into the city and distributing it over the city; an ample stream of unfailing water; a reservoir of large capacity and from which the water is distributed by pipes by gravity to all portions of the city. I cannot supply from memory now the exact number of gallons per day, but about 3½ million gallons so distributed daily is closely, approximately, the amount daily. This company commenced to supply the in-
180 habitants with water about the year 1887–'88. It is still doing so. It has never, to my knowledge, refused to extend its mains and pipes so as to supply houses or the inhabitants residing in houses abutting the public streets of the city. I am not familiar with any such occurrances, nor am I aware of the city authorities or the city ever having requested, required, or demanded of the complainant to extend its pipes or mains on other streets than those already traversed by them. If they have done so, I am not personally aware of any such demands, nor am I aware of the company ever having refused to do so, but the company has always put in new mains, pipes, and hydrants when so directed by the city.

Interrogatory 4. What is about the proportion of the part supplied by the Bienville Company with pipes and mains, so far as population or people are concerned, to that not supplied with pipes and mains? Has the Bienville Water Supply Company made any propositions or offers to the city to extend or enlarge its works? What were such offers or propositions? How far and how much did complainant so propose to extend its works and on what terms? What did the city say or do? Did or would the city entertain any of these offers or propositions from the company? Has the city ever made any propositions or offer to the water company in regard to extending its mains or pipes to cover the area not now covered by the plant of the Bienville Water Company? If you answer yes, then state when and what were the terms proposed and when was this.

To the fourth direct interrogatory he saith: I cannot state from memory the proportion of the part supplied by the Bienville Co. with mains and pipes, so far as population or people are concerned, to that not so supplied with pipes and mains. I think fully one-half of the population; perhaps two-thirds of the white population. The company has always held itself ready and willing, and indeed anxious, to extend or enlarge its works when demanded or requested by the city, and has at times extended its mains and pipes when the city authorities have, in compliance with petitions of the inhabitants for such extensions, made such extensions. I am not aware of the nature or terms. Some of the offers or propositions were parts of the contract between the city and the company relat.

ing to the extension of mains and pipes; other propositions to contract with the city for the purpose of furnishing the city
181 for the operation of a sewerage system. Propositions of this kind were not entertained favorably by the city. I do not know of any propositions or offers of the city to the water Co. in regard to extending its mains or pipes to cover the area not now covered by the plant of the Bienville Water Supply Company.

Interrogatory 5. Has or not the complainant complied with its contract made with the city as to furnishing water? Is or not it still doing so? What is the expense to the complainant for so doing per annum? State this as near as you can. What sources of income has complainant? Has it any other revenue, except from the sale of water to the city and its inhabitants? What water does it supply to the city and county free of cost? What would this free water be worth if paid for?

To the fifth direct interrogatory he saith: The company has complied with its contract made with the city as to furnishing water. It is still doing so. I am not aware of the expense of so doing exactly, but know that it is on an average of about $25,000 per annum. As I have had no occasion to examine the books for that purpose—last year it was $30,800.00. Other parties to this examination can make the statement with much more accuracy than I can, as they are enabled to do so from the record. The complainant's sources of revenue are from the contract with the city for supplying water for fire protection; the furnishing water to the citizens for domestic use, for fountains, and for street and lawn sprinkling and for many small industries where water power is adequate to the purposes required, and also to some of the cotton yards and large plants in and near the city for fire protection. I think also to some of the railroads for water supply for passenger trains. I do not know of any other revenues except those above mentioned. To the city it supplies water free of cost for the municipal buildings and offices, including markets, city hospitals, and public fountains, I think, for an immense quantity for daily flushing the streets from a large number of hydrants or fire-plugs, often as many as twenty per day and from ten to twenty hours, under full pressure of 80 lbs. To the county it supplies water to jail and court-house.

Interrogatory 6. If the city should build its own water works and furnish water to itself and its inhabitants what would be the effect of such action on the income of complainant? Would it
182 materially impair said income or not? Could the complainant make money enough to keep up its plant in good condition if the city should supply itself and its inhabitants with water? Could it pay the interest on its bonds if thus deprived of this part of its revenue?

To the sixth direct interrogatory he saith: The effect of the action suggested would necessarily impair the income of the Bienville Water Supply Company. It would very materially impair said income. It would disable the company to a very great extent, I fear, and as with its present income it has only within the last year or two been enabled to pay a very small interest on its bonds, it

would, under the operation of the competition with the city water works, be unable to pay any further interest on its bonds, perhaps, for some years, when the population of the city may be increased many fold.

Interrogatory 7. Are you acquainted with the Stein system, or what is known as the city water works? If so, state of what they consist and where they are located. Are these works or not being run by the city of Mobile? Do they or not compete with complainant in furnishing water to the inhabitants of Mobile? State how they so compete. Do they or not decrease the income of complainant? State, if you can, about what is the gross income from these Stein water works. Do they or not keep customers away from the Bienville Water Supply Company?

To the seventh direct interrogatory he saith: I am acquainted with the Stein system, or what is known as the city water works, only from having been a lifelong witness to its inefficiency, and without having informed myself particularly of what the plant consists. Its pump-house is at the foot of Spring hill; its reservoir about on the western boundary line of the city limits on Spring Hill road. I do not know whether they are being run or not by the city of Mobile. I only know that officials were elected by the general council and duties assigned them, and that they receive compensation for running the plant. To the extent of their ability these works, as at present, have always competed with the Bienville water works in furnishing water to the inhabitants of the city. They underbid the Bienville Co., or they put a far less value on their supply, as it is without force and is not the pure and wholesome water furnished by the Bienville Co. To the extent of their
183 ability they decrease the income of the Bienville Supply Co. I do not feel competent to state the gross income of the Stein water works. They do keep customers away from the Bienville Water Supply Co.

Interrogatory 8. Where is Three Mile Creek located and how far from the Mobile County court-house? Where is Eight Mile creek located and how far from the court-house? Where is Clear creek located and how far from the court-house of the county of Mobile? What kind of water does Clear creek produce or furnish? What kind of water does Red creek furnish or produce? Is not the water in Red creek muddy and red, particularly in wet weather? What makes Eight Mile creek? If you have in your possession any answers from the city in regard to complainant furnishing it with water, please append them to your answers.

To the eighth direct interrogatory he saith: Clear creek is located northwest from Mobile about nine miles to Thundering spring, west of Spring hill, runs in northeastwardly direction until it forms with Red creek the outlet of the water shed of that portion of the county through Eight Mile creek. Clear creek is estimated variously in its course to be from six to twelve miles from the court-house. It furnishes the purest and whitest and clearest spring water, free from all impurities. Red creek has a reddish-hued water, from which it takes its name, and at times is muddy, and always

has a red appearance. Three Mile creek is located west and north of the city, about 5½ miles from the Mobile County court-house.

Interrogatory 9. Has or not the complainant heretofore objected to the city building its own water works? If you say yes, state when and where and how this was done before the 21st day of February, 1899.

To the ninth direct interrogatory he saith: I am not positive on this point, therefore cannot answer when and where and how such objections were made. I think suit was filed in court by the Bienville Co. from November 30, 1898, to July 20, 1899, seeking to prevent the city of Mobile from building their said system.

Interrogatory 10. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in ques-
184 tion in this cause? If yea, set forth the same fully and at large in your answer.

To the tenth direct interrogatory he saith: No.

Cross:

Cross interrogatory No. 1. Is it not a fact that the Stein system of water works is in a delapidated condition; that the water pipes are very old and are *are* much rusted, and are weak and not in such condition that they will stand much pressure? Is not the pressure necessarily put on the Stein pipes very weak or light? Has not the pump at the pumping station of the Stein water works near the foot of Spring hill, in Mobile county, been in use for many years, and is it not a fact that said pump is of little service in supplying water to the Stein system? How many customers has the Stein water works taken away from the Bienville Water Supply Company since May 14th, 1898, to May 26th, 1899?

To the first cross-interrogatory he saith: It is a fact that the Stein system of water works is in a delapidated condition; that most of the water pipes are old and rusted and weak, and not in a condition to stand much pressure. The pressure put on the pipes must necessarily be very weak or light. The pump at the pumping station at foot of Spring hill, in Mobile county, has been in use for many years, and is unequal to furnishing a large supply of water to the Stein system.

Cross-interrogatory No. 2. Is it not a fact the Eight Mile creek, in Mobile county, Alabama, is not the same creek as Clear creek, in Mobile county? Is it not a fact that what is known and is Eight Mile creek is formed by the junction of said Clear creek and Red creek in Mobile county?

To the second cross-interrogatory he saith: It is not to my knowledge a fact that Eight Mile creek, in Mobile county, is not the same creek as Clear creek, in Mobile county. I do not know that it is a fact that what is known and is Eight Mile creek is formed by the junction of said Clear creek and Red creek in Mobile county.

Cross-interrogatory No. 3. Did the Bienville Water Supply Company from November 30th, 1898, to February 20th, 1899, both dates

inclusive, file any action or suit in any court seeking to prevent the city of Mobile from building the said system of water works it is now actively engaged in building?

185 To the third cross-interrogatory he saith: I am under the impression that the Bienville Water Supply Co. did file such action as is indicated, though I am not positive as to the motive or object of the suit. It was an effort rather to enjoin the city from selling their bonds under the rights given them by their charter.

Cross-interrogatory 4. Do not the president and board of directors of the Bienville Water Supply Company reside in the city and county of Mobile, State of Alabama? Is not the office and chief place of business of said company in the city of Mobile?

To the fourth cross-interrogatory he saith: The president and directors of the Bienville Water Supply Co. do reside in Mobile, Mobile county, State of Alabama. The chief office and place of business of said company is in the city of Mobile.

Cross-interrogatory 5. Did not M. T. Lewman and Company, the contractors for building the system of water works for the city of Mobile, distribute or cause to be distributed, during the months of December, 1898, and January, 1899, upon the streets of the city of Mobile, preparatory to laying the same, hundreds of tons of water pipe? Were not said contractors, M. T. Lewman & Co., actively engaged *engaged* in laying water pipe in the streets of the city of Mobile, under their said contract with said city, during the months of January and February, 1899? Had not said M. T. Lewman and Company actually laid about fifteen miles of iron water pipe in the streets of the city of Mobile on the afternoon of February 21st, 1899, the date the bill was filed in this cause?

To the fifth cross-interrogatory he saith: So far as I know, the allegations contained in cross-interrogatory No. 5 are substantially correct and as stated, though I have no personal knowledge of the facts in reference to the dates named.

GEO. A. KETCHUM.

Certificate.

I, Shelton Sims, the commissioner named in the foregoing commission, which issued out of the honorable the United States circuit court for the southern district of Alabama, and in a certain cause therein pending, wherein The Bienville Water Supply Co. is complainant and the City of Mobile and J. C. Bush are defend-

186 ants, do hereby certify that under and by virtue of the power conferred upon me by said commission I caused the said William C. Pooley, John McGuire, and George A. Ketchum, who are known to me and who I know to be the identical witnesses named in the said commission, to come before me at the times and places hereinafter named—that is to say, I caused the said William C. Pooley to come before me, at my office, in the city of Mobile, on the 5th day of June, A. D. 1899, and the said John McGuire to come before me, at my office, in the city of Mobile, on the 5th day of June, A. D. 1899, and the said George A. Ketchum to come before me, at his office, in the city of Mobile, on the 14th day of June,

A. D. 1899; that said witnesses were first duly sworn by me as stated; that they were then examined by me upon the interrogatories and cross-interrogatories, and testified in response thereto as it is hereinabove written; that their testimony was by me reduced to writing as given by them and as near as might be in the identical language of the said witnesses, and that after their testimony had been so reduced to writing it was by me read over to the said witnesses, who assented to and signed the same in my presence. The solicitors for complainant and respondent, having expressly waived notice of the time and place of examination, were not present.

I further certify that I am not of counsel or of kin to any of the parties to the cause and am not in anywise interested in the result thereof.

Witness my hand and seal as commissioner this the 15th day of June, A. D. 1899.

SHELTON SIMS,
Commissioner. [SEAL.]

Filed June 15, 1899, and published by order of court November 28, 1899.

RICH'D JONES, *Clerk.*

187 *Defendants' Note of Evidence.*

In the Circuit Court of the United States, Southern District of Alabama. In Equity.

THE BIENVILLE WATER SUPPLY COMPANY, Complainant,
vs.
THE CITY OF MOBILE, Defendant. } No. 209.

Note of evidence for defendants.

1. An act entitled "An act to amend sections one, five and eleven of an act to incorporate the Bienville Water Supply Company, approved February 13th, 1883," approved February 14th, 1885 (Acts of Alabama 1884–1885, page 478), as set out in complainant's testimony.

2. An act to authorize the city of Mobile to make and issue bonds for building, purchasing, or otherwise acquiring systems of water works and sewerage for the said city and to mortgage said works to secure said bonds, approved November 30th, 1898 (Local Acts of Alabama 1898–1899, page 16), as appears in answer filed Feb'y 27th, 1899.

3. An act to authorize the city of Mobile to provide, maintain, and operate systems of water works and sewerage, approved November 30th, 1898 (Local Acts of Alabama 1898–1899, page 19), as appears in answer filed Feb'y 27th, 1899.

4. An act to amend an act entitled "An act to amend sections one, five and eleven of an act to incorporate the Bienville Water Supply Company, approved February 13th, 1883," approved Feb-

ruary 23rd, 1899 (Local Acts of Alabama 1898–1899, page 1689), as appears in answer filed Feb'y 27, 1899.

5. An act to authorize the city of Mobile, for the purpose of aiding in the erection of its municipal water works, to condemn by eminent domain the outstanding interest in what is known as the Mobile city water works, approved December 10th, 1898 (Local Acts of Alabama 1898–1899, page 139), as appears in answer filed February 27th, 1899.

6. Answer of the defendants, filed February 27th, 1899.

7. Deposition of Edward M. Robinson.

8. Depositien of A. S. Lyons.

9. Deposition of J. C. Bush.

10. Deposition of Mathew Sloan.

11. Deposition of D. M. N. Ross.

12. Deposition of C. B. Percy.

13. Deposition of John Craft.

14. An act entitled An act for the promotion of the health
188 and convenience of the city of Mobile by the introduction of a supply of wholesome water, &c., approved January 7th, 1841.

Attest: RICH'D JONES,
Clerk of the Circuit Court of the United States at Mobile.

Read and filed Dec. 7th, 1899.

RICH'D JONES, *Clerk.*

TESTIMONY ON THE PART OF THE DEFENDANTS, CITY OF MOBILE ET AL.

Depositions of Edward M. Robinson, D. M. N. Ross, J. C. Bush, A. S. Lyons, C. B. Percy, and Mathew Sloan.

Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama.

BIENVILLE WATER SUPPLY CO.
vs.
THE CITY OF MOBILE ET AL. } No. 209.

To F. O. Hoffman, Esqrs., Mobile, Ala., Greeting.

Know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give you full power and authority, to examine C. B. Percy, Mathew Sloan, D. M. N. Ross, J. C. Bush, A. Sidney Lyons, and Edward M. Robinson as witnesses in a cause pending in our said court, wherein The Bienville Water Supply Co. — plaintiff and The City of Mobile and John Curtis Bush, mayor of said city, — defendant-.

And therefore we command you that on the seventh (7) day of June, A. D. 1899, you do cause the said above-named witnesses to come before you, and then and there examine by you on oath as witnesses in the cause aforesaid upon the interrogatories and cross-interrogatories hereto annexed, and that you or either of you do

take such examination and reduce the same into writing and return the same annexed to this writ, closed up under your seals or the seal of any one of you, into our said circuit court with all convenient speed.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 6th day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

Issued the 6th day of June, A. D. 1899.

Attest:

[SEAL.]

RICH'D JONES,
Clerk Circuit Court, Southern District of Alabama.

189 MOBILE, ALA., *June 6th*, 1899.

Messrs. R. H. Clarke and D. P. Bestor, attorneys for the Bienville Water Supply Co., Mobile.

GENTLEMEN: This is to notify you that under and pursuant to the commission issued out of the United States circuit court for the fifth judicial circuit and southern district of Alabama, in cause numbered 209, wherein The Bienville Water Supply Company is complainant and The City of Mobile defendant, I will examine C. B. Percy, Mathew Sloan, D. M. N. Ross, J. C. Bush, A. Sidney Lyons, and Edward M. Robinson as witnesses, commencing tomorrow, June 7th, 1899, at 5.30 p. m., at my office, No. 68 St. Michael street, in the city of Mobile, Alabama.

Respectfully,

F. O. HOFFMAN,
Commissioner.

Original of this notice received this 6th day of June, 1899, at 10.30 o'clock a. m.

BESTOR & GRAY,
R. H. CLARKE,
Sol's for Compl't.

Depositions of E. M. Robinson, D. M. N. Ross, J. C. Bush, A. S. Lyons C. B. Percy, and Mathew Sloan.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Southern Dist. of Alabama.

THE BIENVILLE WATER SUPPLY COMPANY
vs.
THE CITY OF MOBILE ET ALS. } No. 209.

Under and pursuant to the commission hereto attached, issued out of the honorable circuit court of the United States for the fifth judicial circuit and southern district of Alabama, I caused the witnesses therein named to come before me, at my office, in the city of Mobile, Alabama, at 5.30 o'clock p. m., this seventh day of June, A. D. 1899, having given one day's written notice to the solicitors

for complainant of the time and place of examination of said witnesses, as evidenced by a copy of such notice hereto annexed, notice of the time and place of examination being expressly waived
190 by the solicitor for defendants in said cause, and, after first swearing each of said witnesses to speak the truth, the whole truth, and nothing but the truth, proceeded to examine the witnesses upon the interrogatories and cross-interrogatories attached to said commission.

Deposition of Edward M. Robinson.

EDWARD M. ROBINSON, a witness examined on behalf of the defendants, being duly sworn, testified as follows:

Interrogatory 1. Please state whether or not you were and are a member of the General Assembly of the State of Alabama. Each will please state whether he is a member of the house or the senate of Alabama.

In answer to the first direct interrogatory he saith: I was and am a member of the General Assembly of the State of Alabama; I am a member of the house.

Interrogatory 2. Please state whether or not you know personally Mr. D. P. Bestor and Mr. Richard H. Clarke. Did these gentlemen, as attorneys of the Bienville Water Supply Company, appear before the committees of the house and senate of the General Assembly of Alabama and make arguments and resist the passage of those two certain bills to be entitled (1) An act to authorize the city of Mobile to make and issue bonds for building, purchasing, or otherwise acquiring systems of water works and sewerage for the said city and to mortgage said works to secure said bonds, and (2) entitled An act to authorize the city of Mobile to provide, maintain, and operate systems of water works and sewerage, both of said acts being approved by the governor of Alabama on November 30th, 1898?

In answer to the second direct interrogatory he saith: I am personally acquainted with both Mr. D. P. Bestor and Mr. R. H. Clarke. Yes; these gentlemen appeared before the house and senate committees of the General Assembly of Alabama as attorneys of the Bienville Water Supply Company and made arguments and resisted the passage of the two bills, (1) An act to authorize the city of Mobile to make and issue bonds for the building, purchasing, or otherwise acquiring a system of water works, etc., and (2) An act to authorize the city of Mobile to provide, maintain, and oper-
191 ate systems of water works and sewerage, etc., both of said acts being approved by the governor of Alabama November 30, 1898.

Interrogatory 3. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Objection.—The complainant's object- to the third interrogatory, first, because the questions in the same are so indefinite and vague that complainant is unable to cross them intelligently; second, because the complainant is unable to ascertain from said questions on what subject or point the witnesses are proposed to be examined, so as *to enable complainant to question* witnesses on said subjects or points; third, because by said questions it is not shown whether or not the witnesses are called upon to give legal or illegal testimony, competent or incompetent evidence; fourth, because it enables the witnesses to talk or test-y as to any and every thing they may wish or deem necessary or to make a speech if they think proper, without complainant being able to cross them or stop such irrelevant or immaterial testimony or cross examine in regard to the same.

In answer to the third direct interrogatory he saith: I do not know and cannot set forth any other matter or thing which may be of benefit or advantage to any of the parties to the cause.

Complainant objects to the answers to said third interrogatory on the same grounds above stated.

Cross:

Cross-int'y 1. Please give the exact date or dates that you say Mr. Clarke and Mr. Bestor appeared before the senate and house committees.

In answer to the first cross-interrogatory he saith: It was Tuesday, November 22nd, 1898, that Mr. Bestor and Mr. Clarke appeared before the house and senate committees, appearing before the house committee in the morning and the senate committee in the evening of that date.

EDW. M. ROBINSON.

192 *Deposition of D. M. N. Ross.*

D. M. N. Ross, being duly sworn as aforesaid, did depose and say:

Interrogatory 1. Please state your profession or business and how long you have been engaged in it. What is your present position and how long have you occupied the same? Are you familiar with those certain streams in Mobile county, Alabama, known as Clear creek, Red creek, and Eight Mile creek? Is Eight Mile creek the same creek as Clear creek? What creeks form Eight Mile creek? Are Clear creek and Eight Mile creek and Red creek shown on any official map of Mobile county; and, if so, how are they shown on the same?

In answer to the first interrogatory he saith: I am a civil engineer and surveyor, and have been engaged in it for about forty-one years. My present position is city engineer, and I have occupied it for twenty years. I am familiar with the streams in Mobile county, Alabama, known as Clear creek, Red creek, and Eight Mile creek. Eight Mile creek is not the same creek as Clear creek. Eight Mile creek is formed by Clear creek and Red creek and other

branches. Clear creek, Red creek, and Eight Mile creek are shown upon the official United States map of Mobile county, and upon that map they are shown as the Clear creek and Red creek running into and forming Eight Mile creek.

Interrogatory 2. About how many miles of streets in the city of Mobile are traversed by the water pipes and mains of the Bienville Water Supply Company? About how many miles of streets are there in the city of Mobile? Are there not many miles of streets in the city of Mobile upon which the dwellings and houses of its inhabitants abutt and upon which there are no water pipes or mains laid by the Bienville Water Supply Company, either for domestic or sanitary use or for the use in the extinguishment of fires?

In answer to the second direct interrogatory he saith: There was originally about twenty-five miles of the streets of the city of Mobile traversed by the water mains of the Bienville Water Supply Company, but I do not know at this time accurately how many miles of pipe they have in said streets. There are about one hundred miles of streets in the city of Mobile. There are many
193 miles of streets in the city of Mobile upon which dwellings and houses of its inhabitants abutt upon which the Bienville Water Supply Company have laid no pipes or mains either for domestic or sanitary purposes or for use in the extinguishment of fires.

Interrogatory 3. Has or not the Bienville Water Supply Company refused to extend its water mains upon streets of the city of Mobile upon which many of its inhabitants live unless the city of Mobile would pay for a fire-hydrant at the rate of fifty dollars per annum, said fire-hydrants to be located every four or five hundred feet on such proposed extended water pipes or mains?

In answer to the third direct interrogatory he saith: I understand that the Bienville Company has refused to extend its water mains upon the streets of said city except upon the conditions mentioned. I have heard it discussed between the representatives of the Bienville Water Supply Company and the members of the fire department, but I do not remember what representative of the Bienville Company so discussed it.

Interrogatory 4. What is the condition of what is known as the Stein or Mobile city water works? Are the water pipes of said systems of water works in condition to have much pressure put upon them? Can said water works as they are now furnish sufficient water to the city of Mobile for domestic and sanitary purposes? Can said system be used to any advantage by the city of Mobile in the extinguishment of fires which occur within the limits of said city? Can said Stein system of water works be said to be a competitor of the Bienville Water Supply Company in the matter of obtaining water customers?

In answer to the fourth direct interrogatory he saith: What is known as the Stein or Mobile city water works is in an inferior condition and not of much value. The water pipes of said system are in no condition to have much pressure put upon them; they

will stand very little pressure. The said Stein works cannot as they are now furnish sufficient water to the city of Mobile for domestic and sanitary purposes. The said system cannot be used to any advantage in the extinguishment of fires which occur within the limits of the city. The said Stein water works cannot be said to be a competitor of the Bienville Water Supply Company in the matter of obtaining water customers.

Interrogatory 6. Where does the city of Mobile intend to secure its source of supply of water for the system of water works
194 it is now building?

In answer to the sixth direct interrogatory he saith: The city of Mobile intend to secure its source of supply of water for the system it is now constructing from the Three Mile creek.

Interrogatory 7th. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

In answer to the seventh direct interrogatory he saith: I do not know of anything of benefit to the parties at issue in the cause or the matters in question, except that I do not consider the Stein system of water works of any value after the city gets its contemplated plant constructed.

Cross:

Cross-int'y 1. Are you not in the employ of the city of Mobile under a salary? How are you employed?

In answer to the first cross-interrogatory he saith: Yes; I am employed under a salary by the city of Mobile. I am employed as city engineer.

Cross-int'y 2. How do you know how many miles of the streets of Mobile are traversed by the pipes and mains of the Bienville Water Supply Company? Have you ever measured these pipes? As a fact, do you know; and, if so, how do you know? Do not the pipes and mains of the Bienville Company traverse most of the populous parts of the city of Mobile? In proportion to the population of Mobile, how many of its inhabitants are reached by the pipes and mains of the Bienville Water Company? Is it not the larger portion of such inhabitants? If you state that there are many miles of streets in the city of Mobile upon which the dwellings of its inhabitants abutt and upon which there are no water pipes or mains of the Bienville Company, then state the names of such streets and their location.

In answer to the second cross-interrogatory he saith: I heard it distinctly stated, at the time the Bienville Water Supply Company
put in its plant, the extent in miles of mains laid by it at
195 that time. Since that time they have laid some extensions to the mains laid originally. I heard it generally discussed by the engineers of the Bienville water works at the time of construction of that system. I have never measured these pipes. I

only know it, as stated, from general conversations with the water company's engineers at the time they were laying the pipes. The pipes and mains of the Bienville Water Supply Company do traverse the central portion of the city, which is the most populous part of said city. In my judgment one-half of the population of the city of Mobile is reached by the mains of the Bienville Water Supply Company, but it does not cover one-half the territory of said city.

I cannot state the names or locations of the streets upon which the dwellings of the inhabitants of said city of Mobile abutt upon which the Bienville Water Supply Company has no mains or pipes.

Cross-int'y 3. Has the city ever demanded of or applied to the Bienville Water Supply Company to extend its mains? If so, when and where and to whom was this application made? Of whom was such demand made and by whom? Was it made by you? If made by anybody else, state by whom; and if you were present and heard such demand or application, state what was said on both sides, and give the time and place.

In answer to the third cross-interrogatory he saith: Yes; the city has made application to the Bienville Water Supply Company to extend its mains, this application being made through Dr. Ketchum, the president of the company, and such application was made several years ago. I can't recollect who made the application or demand for such extension, but it was not made by me. I was not present at the time the application was made of which I speak and do not know who made it, but I afterwards heard a discussion of the matter in the council chamber of the general council, at which Dr. Ketchum, president of the company, was present. I do not recollect what was said at the time.

Cross-int'y 4. If you say such refusal was made by the water company, then state if the owners of three-fourths of the improved property of the square where said parties lived demanded or requested the pipes or fire-plugs to be placed on said square. If so, name the square and the people. Do you know what are the provisions of the contract between the city and the Bienville Water Company on this point of extending its mains or pipes? If so, state what it is.

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In answer to the fourth cross-interrogatory he saith: I could not state whether the owners of three-fourths of the improved property of the square where said parties lived demanded or requested the pipes or fire-plugs to be placed on said square. I do not know. The provisions of the contract between the city and the Bienville Water Supply Company provide for a fire-plug every five hundred or a thousand feet and payment therefor by the city.

Cross-int'y 5. Is not the city running the Stein water works and furnishing water to customers for pay? How many customers patronize the Stein Water Company? Is not the water so furnished just as good for drinking, washing, cooking, and other uses about a house for a family as the Bienville water? Is not the only substantial difference between the two water systems a mere question of

pressure? If not, what is it? Do you not know that Mr. Stein always competed with the Bienville Water Company in furnishing water to consumers, and that the city does and has done the same thing since its took possession of the works? Did not Stein furnish this water at a lower price than the Bienville Company? Does not the city continue to do the same thing? Cannot the Stein water works be run so as to furnish water at a much lower expense than the Bienville works? Are there not some one thousand consumers still patronizing the Stein works? State how many there are according to your best information.

In answer to the fifth cross interrogatory he saith: The city is running the Stein water works and furnishing water to customers for pay. I couldn't state how many customers patronize said works. The water furnished from the Steins water works is just as good for use about the family for domestic purposes at the Bienville water. The difference between the two water systems—that is, the Steins works and the Bienville Water Company's—is not merely a question of pressure, but lies also in the diameter of the pipes and the decayed condition of the Stein pipes. There is also a difference in the capacity of the plant and the territory covered by each. In a great many cases old citizens have declined to go to the expense of connecting with the Bienville Water Supply Company's mains and have continued with the Stein works; I do not know that Mr. Stein secured any additional taps or customers since the erection
197 of the Bienville plant, but he kept up his old system. I can't say whether Stein furnished water lower than the Bienville Company. I do not know the prices. The city charges the same rates as those heretofore charged by Stein, I think. The Stein works cannot be run to furnish a large system so as to supply the city at a lower expense than the Bienville Company. I do not know the number of customers now patronizing the Stein works, and have no information on the subject.

Cross-int'y 6. Had M. T. Lewman & Co. laid any pipes in the city of Mobile on the 14th day of September, 1898? Had they any pipes in Mobile at that time? Was not their contract to build those water works based on the condition that the legislature would grant the city authority to issue bonds to pay for such works? Was not this authority granted to the city in November or December, 1898? Was it not granted on the 30th day of November, 1898? Do you not know that M. T. Lewman & Co. never contracted for any pipes and never brought any pipes to Mobile until after this date? Is it not a fact that M. T. Lewman & Co. never brought any pipes to Mobile until January or February, 1899? When did they first bring any such pipes to Mobile?

In answer to the sixth cross-interrogatory he saith: I can't tell whether M. T. Lewman and Company had laid any pipes in the city of Mobile on the 14th day of September, 1898. I can't say whether they had any pipes in Mobile at that time. I understand their contract was to build the water works based upon the condition that the legislature would grant the city the authority to issue bonds to pay for the works. I do not remember the date when this

authority was granted to the city. I do not know whether M. T. Lewman ever contracted for any pipe or ever brought any to Mobile until after that date, viz., November 30th, 1898. I had no connection with the water-works matters, and therefore cannot state anything in reference to when the pipes were brought to Mobile by said Lewman and Company.

Before signing the witness desired to correct the statement at the bottom of the page, in answer to the fourth cross-interrogatory, and says that he does not know the provisions in the contract between the city and the Bienville Company as to the fire-plugs, but that the company has required the city to pay for a fire-plug every five hundred or thousand feet of extensions.

D. M. N. ROSS.

198 *Deposition of J. C. Bush.*

J. C. BUSH, being first duly sworn, did depose and say:

Interrogatory 1. Please state whether or not you are the mayor of the city of Mobile. Are you familiar with the gross revenue derived annually by the said city of Mobile from all sources, including taxation and licenses? Are you familiar with the expenditures made by the city of Mobile for municipal purposes? If so, please state the same. Would the city of Mobile be enabled to pay the interest on the five hundred thousand dollars of water-works bonds if the said city should be restrained by the injunction of this court from completing the water-works system now being constructed by the city of Mobile? Please state fully why it could not pay the interest on said bonds in that event.

In answer to the first direct interrogatory he saith: I am the mayor of the city of Mobile. I know in a general way the gross revenue derived annually by the city of Mobile from all sources, including taxation and licenses, and the expenditures made by the city annually. I can't say that the city of Mobile would be enabled to pay the interest on the five hundred thousand dollars of water-works bonds if said city should be restrained from constructing or completing the water-works system now being built by the city and carry on the affairs of the city as they are now being carried on. If the city could not pay the interest on said bonds, in the event of an injunction preventing the completion of the work, it would be because of lack of revenue, but I do not say that they wouldn't have it.

Interrogatory 2. Do you know the present physical condition of what is known as the Stein water works? Are the water pipes of the Stein water works in condition to have much pressure put upon them? Can said water pipes in their present condition and said works furnish sufficient water to the citizens of Mobile for domestic and sanitary purposes, and can said Stein water works furnish enough water to the city of Mobile to be of any advantage to it for the extinguishment of fires within the limits of said city? Can said Stein's or Mobile city water works be said to be competitors of the

Bienville Water Supply Company in the matter of obtaining water customers?

199 In answer to the second direct interrogatory he saith: I have a fairly good idea of the present physical condition of the property known as the Stein water works. The most of the pipes of the Stein water works are not in a condition to have much pressure put upon them. No; the water pipes of said Stein system and the works cannot furnish sufficient water to the citizens of Mobile for domestic and sanitary purposes, and said Stein works cannot furnish sufficient water to be of any advantage to the said city in the extinguishment of fires with- the city limits. I would not count the Stein water works as a competitor of the Bienville Water Supply Company in the matter of obtaining water customers.

Interrogatory 3. Are you familiar with Red creek, Clear creek, and Eight Mile creek, in Mobile county? Is Eight Mile creek the same as Clear creek? What creeks form Eight Mile creek?

In answer to the third direct interrogatory he saith: I am not familiar with Red creek or Clear creek, but I have been to Eight Mile creek, in Mobile county. I don't know whether Eight Mile creek is the same as Clear creek, as I have never been out to Clear creek. From my personal knowledge, I cannot tell what creeks form Eight Mile creek. From the maps which I have inspected, I know that Red creek and Clear creek form Eight Mile creek, but, as stated, I have never been to Clear creek or Red creek.

Interrogatory 4. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

In answer to the fourth direct interrogatory he saith: I know of nothing further that I can set forth of advantage to either of the parties in the cause.

Cross:

Cross-int'y 1. Have you not frequently stated that the city would be able to pay the interest on these bonds, whether it made any money or not from the proceeds of the new proposed

200 water plant? Have you not stated more than once and to several people that the city could pay such interest on the coupons on its water bonds, even if the proposed new water works could only pay expenses of running the plant? Why is it you have now changed your opinion?

In answer to the first cross-interrogatory he saith: I have stated that I thought, from the saving in the cost to the city for fire-hydrants and the income derived from the sewers, the city might be able to pay the interest on the water bonds, but the water plant is necessary to operate the sewers. I have stated that if our water plant and the sewer plant are both in operation, by the saving of the amount paid the Bienville Water Supply Company for fire-hydrants and the income derived from the sewers, that the city might

be able to pay the interest, even if it only made running expenses on the water works. I have not changed *by* opinion as to this.

Cross-interrogatory 2. Have you not stated frequently that the city could pay the interest on its new bonds proposed to be issued both for sewers and water works, even if the city derived no income or no substantial income from these plants? Did you not make such statement to Mr. Walter Wood in Mobile, and also elsewhere? If you made such statement was it correct or not?

In answer to the second cross-interrogatory he saith: I have not stated that the city could pay the interest on its new bonds for sewers and water works, even if the city derived no income or substantial income from these plants. I did not make such a statement to Mr. Walter Wood in Mobile or elsewhere. As stated, I never made such statement.

Cross-int'y 3. Have you not stated several times in the spring and summer of 1898 that the city could pay this interest out of the savings from its general fund, even if it made no money out of the water-works system? Did you not say this to Mr. Walter Wood?

In answer to the third cross-interrogatory he saith: I did not state in the spring or summer of 1898 that the city could pay the interest out of savings from its general fund, even if it made no money out of its water works, but I told Mr. Wood that if the city run the water works at cost we would save the $14,000.00 we are now paying the Bienville Company for fire-hydrants, and
201 that amount, together with the income from the sewers, I thought, would enable us to meet the interest on these bonds.

Cross-int'y 4. Have you, as mayor of Mobile, not known all the time that the Bienville Water Supply Company objected to the city building its own water works? Have you not, as mayor of Mobile, known all the time that the Bienville Water Supply Company objected to the city issuing bonds to raise money to build its own water works? Did it not object to such proposed actions on the part of the city during the spring and summer of 1898? Did it not file a bill in the Mobile chancery court on the 14th day of September, 1898, seeking to stop the city from issuing bonds to raise money to build water works?

In answer to the fourth cross-interrogatory he saith: I have had ample evidence that the Bienville Water Supply Company objected to the city building its water works, but I have never heard Mr. Wood say so. The first time I knew that the Bienville Water Supply Company objected to the city raising money by issuing bonds to build its own system of water works was when it filed its bill of complaint in the chancery court of Mobile in September, 1898. I don't remember about the Bienville Company objecting in the spring and summer of 1898 to the proposed action of the city. It did file a bill in the chancery court of Mobile on September 14, 1898, seeking to stop the city from issuing bonds to build its own system of water works.

Cross-int'y 5. Is not the city of Mobile running the Stein system of water works and collecting money from customers? Please at-

tach to your answers a copy of so much of your communication to the general council of June 13th, 1898, as refers to these Stein or city water works. Is not the water from Three Mile Creek or the Stein works good and wholesome water for drinking and family use? Do not these Stein water-works pipes extend over the most populous parts of the city of Mobile? How many water consumers have the Stein water-works system, now run by the city of Mobile? Are not such customers supplied with this water from day to day for all their wants? Will not and does not such water reach the yards and first floors of all persons in Mobile wishing to use it? Is it not good and wholesome water? Is there really any material difference between the supply to families of this water and the water from the Bienville system except the stronger pressure
202 of the latter? Cannot the Stein water works be run much cheaper than the Bienville plant, and are they not so run by the city? Were they not so run by Stein?

In answer to the fifth cross-interrogatory he saith: The city of Mobile is running the Stein water works and collecting money from customers. I attach hereto, as requested, so much of my communication of June 13th, 1898, to the general council as refers to the Stein or Mobile city water works.

"EXHIBIT A."

The water and sewer commission has requested me to present to you the resolution passed by them instructing the city attorney to file a bill in chancery to compel Mr. Walter Wood to specifically perform the award of the arbitrators appointed to value the Stein water works. The water works are being run by the old employés the same as before the city took charge. The salaries of the different employees under the Stein management were, for the book-keeper $7.50 per week; the collector received eight per cent commissions upon the amount of his collections, which amounted to about $500 per year, and the engineer received $36.00 per month. I am informed that the cost of repairs averaged about fifty five dollars per month and the improvements about thirty-five dollars per month, the cost of wood being $1,600 per annum.

We have made a slight increase in the pay of these different employees since they have been working for the city, and they seem to be very faithful in the performance of their duties. The office of superintendent and book-keeper can easily be filled by one man, two offers having been made by an old employee to do so. I think it much better to employ a collector upon a commission than a regular salary, as it is a greater incentive for him to work. It will be necessary to run matters very close if we expect to get through without loss.

We have not yet settled the interest in the Mobile city water works formerly belonging to Fulton & Colwell and now controlled by Tinsley Jeter, of Bethlehem, Pa. When the award was made we understood that this interest belonged to Messrs. Fulton and Colwell, and after the award a check deposited in the First national

bank, payable to these parties. Since then it has developed that prior to the award Mr. Fulton had sold his interest in the
203 water works to Mrs. Laura R. Colwell, and Mrs. Colwell had sold it to Mr. Tinsley Jeter, and Mr. Jeter offers us these various deeds and his own deed to the city conveying to us this interest in the property, and demands the money. The water and sewer commission recommends that the city pay Mr. Jeter, as it is advised and believes that Mr. Wood cannot hold the city's check, which he has attempted to attach in the First national bank. I trust the council will take action upon this recommendation. I have received no reply to my communication addressed to the president of the Bienville Water Supply Company, which I wrote at the request of the council. I do not believe they will sell the works to the city, nor do I believe they will arbitrate the matter at all.

J. C. BUSH, *Mayor.*

I think the water from said Stein works or Three Mile creek is good and wholesome for family use. I do not know where the Stein water pipes extend. I can't tell without referring to the books of the city how many customers the city now has taking water from the Stein or Mobile city water works. The customers are not, in my opinion, supplied with water from day to day for all their wants, because they constantly complain of an insufficient supply. The water does not at all times reach the yards and first floors of all persons in Mobile wishing to use it. I think it is a good and wholesome water. There is a great difference between the supply of water from the Stein system and the Bienville Company, besides the pressure upon the latter being greater. I do not know what it costs to run the Bienville plant, but I should say that the Stein plant should be run much cheaper than the Bienville plant. I think the Stein works were run by Stein cheaper than the Bienville plant costs to run, but I do not know what it costs to run either.

Cross-int'y 6. Did you not, as mayor of the city of Mobile, take possession of the Stein system of water works in 1898? When did you do so? Did you not go personally out to the pumping station of said system on or near the Spring Hill road, in company with Boykin Boone, Esq., and take such possession? When did you do so? Did you not then exclude from such possession one Pooley as the representative of Walter Wood? Did you not, or said Boone in your presence, tell said Pooley then and there that the
204 police would be used to prevent any one going on said premises without the consent of the city? If said Boone made such statement did you not hear it, and did you dissent from it? What did you say in regard to it? Was not said Boone then the city attorney, and did he not go with you in that capacity, and to advise and assist you in taking possession of said water-works plant? Have you not ever since that time excluded Walter Wood from any possession of the property and rights of said Stein system? Who has had the exclusive possession of said system and of its property and rights since that time and up to the present? Have you not had it in your capacity as mayor and for said city?

In answer to cross-interrogatory sixth he saith: As mayor of the city of Mobile, I took possession of the Stein water works in 1898. I don't remember the month or exact date. I did go out personally to the pumping station in company with Boykin Boone, Esq., the city attorney, and took possession of said plant. I did not then exclude Pooley from possession as the representative of Walter Wood, but I had gotten possession myself, and I think I told Mr. Pooley, who came up afterwards, that I was in possession. I do not know whether either myself or Mr. Boone stated to Mr. Pooley that that police force would be used to prevent any one going on said premises without the consent of this city. I think that Mr. Stein put us in possession and Mr. Pooley came up afterwards, and I stated that we had been put in possession by Mr. Stein, and that if any one interfered with us I would send an officer there to protect us. If said Boone made such a statement as inquired about in the interrogatory, I did not dissent from it. Said Boone was then city attorney, but I do not know in what capacity he went. I asked him to go along with me, and he went, and whether he went in his official capacity or a friend I do not know.

Mr. Wood has never said anything to me about the possession of the property or rights of said Stein system since the time we took possession, as stated above, and I have never said anything to Mr. Wood about the possession, but the city has kept possession of it ever since it took possession of the same. The city of Mobile has had the exclusive possession since the time it took possession up to the present time. It is in the possession of the city and has been ever since I took possession for the city. I have not been out there since taking possession as mayor, but the city has had possession ever since.

J. C. BUSH.

205 After reading over his said testimony, the witness desired to explain his answer to the fourth cross-interrogatory as set out above, and says:

The "ample evidence" of objection on the part of the Bienville Water Supply Company to the city's building its own system of water works, referred to in my answer, is in the shape of the bills filed by it in the U. S. circuit court, February 21st, 1899, seeking injunctions against said city in said matter, but the said company and no one representing it ever filed with me as mayor, or with the general council, any paper, or stated any oral objection to the building of said water works. Upon an investigation I find that the bill referred to in my answer to this interrogatory as having been filed in the chancery court of Mobile county on September 14th, 1898, did not ask to enjoin the building of water works, but was a tax-payer's bill seeking to enjoin the city from issuing bonds to pay for the building of a system of water works, and claimed that the city had no authority to issue bonds for that purpose. This bill in the chancery court was not called up for a hearing until after the passage of the acts of November 30th, 1898, which authorized the city to issue

the bonds to build the water works, and on the hearing (at the April, 1899, term of the court) the chancellor dismissed the said bill.

After the passage of the bills of November 30th, 1899, neither myself, as mayor, or the general council of the city of Mobile, ever heard of any objection from the Bienville Company or Mr. Walter Wood to the constructing of a water-works system by the city of Mobile under said acts of the General Assembly until the filing of the bills in the United States circuit court on February 21st, 1899.

J. C. BUSH.

Subscribed and sworn to before me this 7th day of June, 1899.

F. O. HOFFMAN,
Commissioner.

The further taking of testimony was thereupon adjourned until June 8th, 1899, 5.30 o'clock p. m., by agreement of solicitors for the respective parties to the cause.

F. O. HOFFMAN,
Commissioner.

JUNE 8TH—5.30 p. m.

The examination is resumed pursuant to adjournment.

206 *Deposition of A. S. Lyons.*

A. S. LYONS, a witness examined on behalf of the defendant, being duly sworn, deposes and says:

Interrogatory No. 1. Please state whether or not you were and are a member of the General Assembly of the State of Alabama. Each will please state whether he is a member of the house or the senate of Alabama.

In answer to the first direct interrogatory he saith: Yes; I am a member of the General Assembly of Alabama, and am State senator from Mobile county.

Interrogatory 2. Please state whether or not you know personally Mr. D. P. Bestor and Mr. Richard H. Clarke. Did these gentlemen, as attorneys of the Bienville Water Supply Company, appear before the committees of the house and senate of the General Assembly of Alabama and make arguments and resist the passage of those two certain bills to be entitled (1), An act to authorize the city of Mobile to make and issue bonds for building, purchasing, or otherwise acquiring systems of water works and sewerage for the said city, and to mortgage said works to secure said bonds, and (2) entitled An act to authorize the city of Mobile to provide, maintain, and operate systems of water works and sewerage, both of said acts being approved by the governor of Alabama on November 30th, 1898?

In answer to the 2nd direct interrogatory he saith: Yes; I know personally Mr. D. P. Bestor and Mr. R. H. Clarke. Those gentlemen did appear before the senate and house committees of the General Assembly of Alabama and made arguments and resisted the passage of the said bills or acts enquired about in this interrogatory.

Interrogatory 3. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examinationor the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Objection.—The complainant objects to the third interrogatory filed to A. S. Lyons, first, because the questions in the same
207 are so indefinite and vague that complainant is unable to cross them intelligently; second, because the complainant is unable to ascertain from said questions on what subject or point the witnesses are proposed to be examined so as to enable complainant to question witness on said subject or points; third, because by said questions it is not shown whether or not the witnesses are called upon to give legal or illegal testimony, competent or incompetent evidence; fourth, because it enables the witnesses to talk or testify as to any and every thing they may wish or deem necessary, or to make a speech, if they think proper, without complainant being able to cross them or stop such irrelevant or immaterial testimony or cross-examine in regard to the same.

In answer to the third direct interrogatory he saith: As a member of the general council of the city of Mobile and as a member of the finance committee of that body I can state that I know that if the system of water works now in course of construction by said city are not permitted to be completed and operated that the income of the city of Mobile, owing to the expense it is now under and the amount of revenue annually collected from taxation and licenses, would not be sufficient to pay the interest upon the $500,000 of water-works bonds issued by said city, and the city would certainly be in default on the same.

Objection.—Complainant objects to the answers to said third interrogatory on the same grounds above stated.

Cross:

Cross-int'y 1. Please give the exact date or dates that you say Mr. Clarke and Mr. Bestor appeared before the senate and house committees.

In answer to the first cross-interrogatory he saith: The exact date that Mr. Clarke and Mr. Bestor appeared before the senate and house committee- was Tuesday, November 22nd, 1898, appearing before the house committee in the morning and before the senate committee at 6 p. m. the same day.

Cross-int'y 2. Are you not a member of the general council of the city of Mobile? How long have you been such member? Were you not on what was known or called the water-works committee? As such did not you inquire into and report to the board the
208 probable cost of water works? Among other reports on this subject, did you not make a lengthy report to the council on September 13, 1898?

In answer to the second cross-interrogatory he saith: I am a

member of the general council of the city of Mobile, as stated in answer to the direct interrogatory. I have been a member of the present general council about two years. The only committee of the general council that I remember being on was a special committee appointed to look over the bids of the various bidders for the construction of the water works now being constructed. I was chairman of that committee, and as such reported to the general council what the bids were which said committee received. As chairman of that special committee I did make a lengthy report to the council on September 13, 1898.

Cross-int'y 3. Did you not have conversations with Mr. Walter Wood and also with his counsel on this water-works subject? Did you not know at this time, September 13th, 1898, and previously that the Bienville Water Supply Company objected to the building of other water works? Did you not know at this time and previous thereto that the Bienville Water Company objected to the city issuing bonds in order to build water works? Have not you and the city officials known these facts from the beginning of this water-works agitation, viz., ever since August, 1897? Were you not an active supporter of this plan of the city owning its own water works, and did you not talk with the officials of the water works company and their counsel and also the officials of the city during these times, and especially in July, August, and September, 1898, on these subjects? Did not you so talk to Mayor Bush on this subject? Did not Mayor Bush and Mr. E. B. Kirkbride, the president of the council, know during these dates that the Bienville Water Supply Company objected to the city constructing its own water works? Did not all the city council know this, or nearly all of them, and has not this matter and this objection been frequently discussed at the meetings of the council previous to November, 1898?

In answer to the third cross interrogatory: Yes; I have talked water works with Mr. Walter Wood many times, and also with Mr. Bestor on one occasion, but I do not remember discussing the matter with Mr. R. H. Clarke until about November 15th, 1898. I did not know that the Bienville Water Supply Company objected
209 prior to the thirteenth of September, 1898, or at any time objected to the construction of other works, but I did know that Mr. Walter Wood expressed a wish that they would not be. As a friend of Mr. Wood, I urged upon him in every possible way the propriety of his entering into negotiations with the city of Mobile for the sale of what is known as the Bienville Water Supply Company to the city. I also urged this upon Mr. Bestor and Mr. McCallum, who is known as the general superintendent of the Bienville Water Supply Company. This was all prior to the city entering into its contract for the construction of a water-works system.

In Montgomery, Alabama, on November 22nd, 1898, I again urged upon Mr. McCallum the same idea, and endeavored to pursuade him to come to Mobile with a view of negotiating with the city for the sale of what is known as the Bienville Water Supply Company. No; I did not know that the said Bienville Water Sup-

ply Company ever objected prior to September 13th, 1898, to the city issuing bonds for the purpose of building a system of water works. No, sir; I have not know- officially that the company objected to the issuance of bonds since August, 1897, nor do I know that any other member of the city government knew such fact, if it is a fact.

I was an earnest advocate of the city owning its own water-works system, and, as stated previously, I did have conversations with Messrs. Wood, Bestor, and McCallum, but I did not have such conversations with them during July, August, and September, 1898; but with the city officials I did talk concerning the matter during the said months.

I talked to Mayor Bush on the subject of the city acquiring and owning its own water system. I do not know, however, what information Mayor Bush or Mr. E. B. Kirkbride, the president of the general council, had upon the question whether the Bienville Company objected to the city issuing bonds during the months inquired about; I can only speak for myself upon that subject.

I do not think that the general council of the city ever officially knew of any objection on the part of the Bienville Water Supply Company to the construction of said works, but the individual members may have heard street rumor or talk about such matters.

I don't remember that any such question was ever discussed
210 in the general council prior to November, 1898. It is my opinion that the general council would have been very glad to have had some proposition for purchase of the Bienville plant previous to November 25th, 1898, but to my knowledge none was received.

Cross-int'y 4. Did not you state during these times to Mr. Walter Wood or to Mr. MacCallum or to the counsel of the Bienville Water Supply Company that you considered the Bienville water plant was worth about $200,000, and that if the company would not sell at that price that the city would build its own works and break down the Bienville Company, or words to this effect? What did you state on this subject?

In answer to the fourth cross-interrogatory he saith: In a conversation with Mr. Walter Wood, urging him to sell the Bienville water plant, I stated that I had been informed that the Bienville water plant was worth between 200 and 250 thousand dollars, but individually if he would sell to the city I would be willing to pay him, I thought, four hundred thousand dollars simply to remove the competition. I stated about the same thing in substance to Mr. McCallum, and was informed by Mr. McCallum that Mr. Wood did not own the Bienville Water Supply Company and was in no position to sell.

A. S. LYONS.

Deposition of C. B. Percy.

C. B. PERCY, sworn as a witness on behalf of the defendant, testified as follows:

Interrogatory 1. Please state your profession or business and how long you have been engaged in it. What is your present position and how long have you occupied the same? Are you familiar with those certain streams in Mobile county, Alabama, known as Clear creek, Red creek, and Eight Mile creek? Is Eight Mile creek the same creek as Clear creek? What creeks form Eight Mile creek? Are Clear creek and Eight Mile creek and Red creek shown on any official map of Mobile county; and, if so, how are they shown on the same?

In answer to the first direct interrogatory he saith: I am a civil engineer, and have been engaged in it since June, 1870. My present occupation is assistant engineer in charge of the water-
211 works system now under construction by the city of Mobile, and have held this position since the 1st day of November, 1898. I am not familiar with the streams in Mobile county known as Clear creek, Red creek, and Eight Mile creek, and cannot state anything about the same.

Interrogatory 2nd. About how many miles of streets in the city of Mobile are traversed by the water pipes and mains of the Bienville Water Supply Company? About how many miles of streets are there in the city of Mobile? Are there not many miles of streets in the city of Mobile upon which the dwellings and houses of its inhabitants abut and upon which there are no water pipes or mains laid by the Bienville Water Supply Company, either for domestic or sanitary use or for use in the extinguishment of fires?

In answer to the second direct interrogatory he saith: I don't know how many miles of the streets of Mobile are traversed by the mains of the Bienville Water Supply Company except by hearsay. There are about a hundred *and* one hundred and ten miles of streets in the city of Mobile. There are many miles of streets in the city of Mobile upon which the Bienville Company has no pipes or mains whatever for any purpose.

Interrogatory 3rd. Has or not the Bienville Water Supply Company refused to extend its water mains upon streets of the city of Mobile upon which many of its inhabitants live unless the city of Mobile would pay for a fire-hydrant at the rate of fifty dollars per annum, said fire-hydrants to be located every four or five hundred feet on such proposed extended water pipes or mains?

In answer to the third direct interrogatory he saith: Of my own knowledge, I know nothing of the subject enquired about.

Interrogatory 4. What is the condition of what is known as the Stein or Mobile city water works? Are the water pipes of said system of water works in condition to have much pressure put upon them? Can said water works as they are now furnish sufficient water to the city of Mobile for domestic and sanitary purposes? Can said system be used to any advantage by the city of Mobile in

extinguishment of fires which occur within the limits of said city? Can said Stein system of water works be said to be a competitor of the Bienville Water Supply Company in the matter of obtaining water customers?

212 In answer to the fourth direct interrogatory he saith: The condition of the Stein or Mobile city water works is very poor, indeed. The water pipes of said system are not in any condition to stand much pressure put upon them. I do not think said works as they are now could furnish sufficient water to the city of Mobile for domestic and sanitary purposes. Said system, in my opinion, cannot be used to any advantage by the city of Mobile for the purpose of extinguishing fires within the limits of said city. I do not think the Stein water works could be considered in any sense a competitor of the Bienville Water Supply Company in the matter of securing water customers.

Interrogatory 5. How many miles had M. T. Lewman and Company actually laid in the streets of the city of Mobile under their contract with said city for building a system of water works on the 20th day of February, 1899? Did not M. T. Lewman and Company begin to distribute iron water pipe, hydrants, valves, etc., in the streets of the city of Mobile early in December, 1898, as a part of the general plan of constructing a system of water works for the city of Mobile? How much water-works material had been distributed in the city of Mobile on February 20th, 1899, preparatory to being placed in the ground as a part of the system of water works being constructed for the city of Mobile by M. T. Lewman and Company, and what was the value of the same?

In answer to the fifth direct interrogatory he saith: On the 20th day of February, 1899, M. T. Lewman and Company, under their contract with said city of Mobile for the construction of a water-works system, had laid an aggregate of twelve and four one-hundredths miles of water mains in the streets of the city of Mobile. I do not remember the exact date when Lewman and Company, contractors, began the distribution of pipes along the streets of the city of Mobile, together with valves, hydrants, etc., under the general plan of constructing a water-works system, but I do know they began such distribution some time in the month of December, 1898.

On February 20th, 1899, there had been placed on the streets of said city by Lewman and Company, contractors, preparatory to being placed in the ground as a part of the system of water works being constructed by them for said city, not including that

213 which had been laid, the following material: Water pipe, 1,947 tons; forty tons of lead, valves, hydrants, and specials. The total value of the same, not including the material which had been laid in the ground (12.04 miles, stated above), was in the aggregate $48,400. I cannot state with any accuracy the value of the materials, etc., which had been placed into the ground, viz., the 12.04 miles testified to, but it was additional to said sum of $48,400. The cost of the pipe constituting said 12.04 miles was the sum of $28,356.00.

Interrogatory 6. Where does the city of Mobile intend to secure its source of supply of water for the system of water works it is now building?

In answer to the sixth direct interrogatory he saith: The city of Mobile intends to secure its source of water supply for the system of works it is now building from Three Mile creek.

Interrogatory 7. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

In answer to the seventh direct interrogatory he saith: I do not know of anything which may be of benefit or material to either party to the cause which is not set forth in my answers.

Cross:

Cross-int'y 1. Are you not in the employ of the city of Mobile under a salary; how are you employed?

In answer to the first cross-interrogatory he saith: I am employed by the city of Mobile under a salary, as assistant engineer.

Cross-int'y 2. How do you know how many miles of the streets of Mobile are traversed by the pipes and mains of the Bienville Water Supply Company? Have you ever measured these pipes? As a fact, do you know; and, if so, how do you know? Do not the pipes and mains of the Bienville Company traverse most of the populous parts of the city of Mobile? In proportion to the population of Mobile, how many of its inhabitants are reached by the pipes and mains of the Bienville Water Company? Is it not the larger portion of such inhabitants? If you state that there are many miles of streets in the city of Mobile, upon which the 214 dwellings of its inhabitants abut and upon which there are no water pipes or mains of the Bienville Company, then state the names of such streets and their location.

In answer to the 2nd cross-interrogatory he saith: I have stated I don't know how many miles of streets are traversed by the pipes or mains of the Bienville Company. I judge that the pipes or mains of the Bienville Company do traverse the most populous part or most settled part of the city of Mobile. I have no idea what proportion of the inhabitants of the city of Mobile are reached by the mains and pipes of the said Bienville Water Supply Company. I judge they reach about one-half to two-thirds of the people in the city of Mobile, but I know nothing of the matter of my own personal knowledge. I can't state the names of the streets or their locations upon which the Bienville Company has no mains or pipes located.

Cross-interrogatory 3. Has the city ever demanded of or applied to the Bienville Water Supply Company to extend its mains? If so, when and where and to whom was this application made? Of whom was such demand made and by whom? Was it made by you? If made by anybody else, state by whom, and if you were present

and heard such demand or application state what was said on both sides and give the time and place.

In answer to cross-interrogatory three he saith: I have no information or knowledge upon the subject-matter inquired about in this interrogatory.

Cross-int'y 4. If you say such refusal was made by the water company, then state if the owners of three-fourths of the improved property of the square where said parties lived demanded or requested the pipes or fire-plugs to be placed on said square. If so, name the square and the people. Do you know what are the provisions of the contract between the city and the Bienville Water Company on this point of extending its mains or pipes? If so, state what it is.

In answer to the fourth cross-interrogatory he saith: I have no knowledge or information upon the subject inquired about.

Cross-int'y 5. Is not the city running the Stein water works and furnishing water to customers for pay? How many customers patronize the Stein Water Company? Is not the water so
215 furnished just as good for drinking, washing, cooking, and other uses about a house for a family as the Bienville water? Is not the only substantial difference between the two water systems a mere question of pressure? If not, what is it? Do you not know that Mr. Stein always competed with the Bienville Water Company in furnishing water to consumers, and that the city does and has done the same thing since it took possession of the works? Did not Stein furnish this water at a lower price than the Bienville Company? Does not the city continue to do the same thing? Cannot the Stein water works be run so as to furnish water at a much lower expense than the Bienville works? Are there not some one thousand consumers still patronizing the Stein works? State how many there are according to your best information.

In answer to the fifth cross-interrogatory he saith: I believe the city does run the Stein water works and furnish water to consumers for pay, but I have no idea how many customers patronize said works. The quality of the water furnished by the Stein works is just as good for domestic purposes as that furnished by the Bienville Company. I should say that the substantial differences between the Stein and Bienville systems was the question of pressure and the quantity of water which can be furnished by each. I suppose Mr. Stein or the city would like to get as many customers as they could, but of my own knowledge I don't know that they have either competed with the Bienville Company. I know nothing about whether Stein furnished water at a lower price than the Bienville Company, nor do I know what the city's rates are for water as compared to the Bienville rates. I can't answer whether the Stein works can be run so as to furnish water at a much lower rate than the Bienville works. I don't know how many consumers are now patronizing the Stein or Mobile city water works.

Cross-int'y 6. Had M. T. Lewman & Co. laid any pipes in the city of Mobile on the 14th day of September, 1898? Had they any pipes in Mobile at that time? Was not their contract to build those water

works based on the condition that the legislature would grant the city authority to issue bonds to pay for such works? Was not this authority granted to the city in November or December, 1898? Was it not granted on the 30th day of November, 1898? Do you not know that M. T. Lewman & Co. never contracted for any pipes and never brought any pipes to Mobile until after this date?

216 Is it not a fact that M. T. Lewman & Co. never brought any pipes to Mobile until January or February, 1899? When did they first bring any such pipes to Mobile?

In answer to the sixth cross-interrogatory he saith: M. T. Lewman and Company had not on the 14th day of September, 1898, laid any water pipes or materials upon the streets of the city of Mobile. They had no pipe in Mobile at that time. I suppose the contract of Lewman and Company was based upon the condition that the legislature would grant the city the authority to build water works and issue bonds to pay for the same. I don't remember when the authority to issue bonds was granted to the city. I do not know when M. T. Lewman contracted for water pipes or anything about it. M. T. Lewman and Company first brought pipes to the city of Mobile some time in December, 1898.

C. B. PERCY.

The taking of depositions under said commission was, by agreement of counsel, adjourned until tomorrow evening, June 9th, 1899.

F. O. HOFFMAN,
Commissioner.

The taking of the testimony under said commission was resumed at 5.30 p. m., this 9th day of June, A. D. 1899.

Deposition of Mathew Sloan.

MATHEW SLOAN, being first duly sworn, did depose and say:

Direct:

Interrogatory 1. Please state your profession or business and how long you have been engaged in it. What is your present position and how long have you occupied the same? Are you familiar with those certain streams in Mobile county, Alabama, known as Clear creek, Red creek, and Eight Mile creek? Is Eight Mile creek the same creek as Clear creek? What creeks form Eight Mile creek? Are Clear Creek and Eight Mile creek and Red creek shown on any official map of Mobile county; and, if so, how are they shown on the same?

In answer to the first direct interrogatory he saith: I am chief engineer of the Mobile fire department, and have occupied that position for seventeen years. I do not know anything about Clear creek, Red creek, or Eight Mile creek, as inquired about.

217 Interrogatory 2. About how many miles of streets in the city of Mobile are traversed by the water pipes and mains of the Bienville Water Supply Company? About how many miles

of streets are there in the city of Mobile? Are there not many miles of streets in the city of Mobile upon which the dwellings and houses of its inhabitants abutt and upon which there are no water pipes or mains laid by the Bienville Water Supply Company, either for domestic or sanitary use or for use in the extinguishment of fires?

In answer to the second direct interrogatory he saith: I have always understood from thirty-five to forty miles of streets of the city of Mobile are traversed by the mains of the Bienville Water Supply Company. I got this information from Mr. Turner when he was superintendent of the Bienville Water Supply Company. There are about ninety-nine miles of streets in the city of Mobile. There are many miles of streets in the city of Mobile upon which the houses of its inhabitants abutt and upon which there are no water pipes or mains laid by the Bienville Water Supply Company, either for domestic or sanitary use or for use in the extinguishment of fires.

Interrogatory 3. Has or not the Bienville Water Supply Company refused to extend its water mains upon streets of the city of Mobile upon which many of its inhabitants live, unless the city of Mobile would pay for a fire-hydrant at the rate of fifty dollars per annum, said fire-hydrants to be located every four or five hundred feet on such proposed extended water pipes or mains?

In answer to the third direct interrogatory he saith: Yes; the Bienville Water Supply Company refused to extend its water mains upon the streets of the city of Mobile upon which many inhabitants live, unless the city paid for a fire-hydrant at the rate of fifty dollars per annum each for every four or five hundred feet of such extensions. I remember at this time two cases where the inhabitants came to me and asked that I recommend the placing of fire-hydrants on Claiborne and Franklin streets south of Monroe, in order to get the Bienville Company to extend its mains along said streets, in one case Mr. Joe Welsh, and the other Mr. James Nelson, representing the property-owners living on the street. I was harrassed for quite a while with a number of such applications, the names of the parties and of the streets having been forgotten by me.

218 Interrogatory 4th. What is the condition of what is known as the Stein or Mobile city water works? Are the water pipes of said system of water works in condition to have much pressure put upon them? Can said water works as they are now furnish sufficient water to the city of Mobile for domestic and sanitary purposes? Can said system be used to any advantage by the city of Mobile in the extinguishment of fires which occur within the limits of said city? Can said Stein system of water works be said to be a competitor of the Bienville Water Supply Company in the matter of obtaining water customers?

In answer to the fourth direct interrogatory he saith: The condition of the pipes or mains of the Stein or Mobile city water works is very poor, and they are in fact almost useless, being filled with sediment and rust. The pipes are in no condition to stand much pressure upon them. Said Stein water works cannot, as they

are now, furnish sufficient water to the inhabitants of the city of Mobile for sanitary and domestic purposes. Said system cannot be used at all by said city in the extinguishment of fires which occur within the limits of said city. I do not think that the Stein water works system could be said to be a competitor of the Bienville Company in the matter of obtaining water customers.

Interrogatory 6th. Where does the city of Mobile intend to secure its source of supply of water for the system of water works it is now building?

In answer to the sixth direct interrogatory he saith: The city of Mobile intends to secure its source of water supply for the system it is now building from Lewis' mill pond, on Three Mile creek and near Spring hill, in Mobile county.

Interrogatory 7th. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

In answer to the seventh direct interrogatory he saith: I do not know of anything of benefit to either party which is not set forth in my answers.

Cross:

219 Cross-int'y 1. Are you not in the employ of the city of Mobile under a salary? How are you employed?

In answer to the first cross-interrogatory he saith: As stated in answer to the first direct interrogatory, I am employed by the city of Mobile under a salary as its chief engineer of the fire department.

Cross-int'y 2. How do you know how many miles of the streets of Mobile are traversed by the pipes and mains of the Bienville Water Supply Company? Have you ever measured these pipes? As a fact, do you know, and, if so, how do you know? Do not the pipes and mains of the Bienville Company traverse most of the populous parts of the city of Mobile? In proportion to the population of Mobile, how many of its inhabitants are reached by the pipes and mains of the Bienville Water Company? Is it not the larger portion of such inhabitants? If you state that there are many miles of streets in the city of Mobile upon which the dwellings of its inhabitants abut, and upon which there are no water pipes or mains of the Bienville Company, then state the names of such streets and their location.

In answer to the second cross-interrogatory he saith: I have never measured the pipes of the Bienville pipes, but I got my information from Mr. John Turner, superintendent of the Bienville Company, as to the length of their mains in the streets of the city; he was very friendly with me and we discussed these matters often, and he told me that at first there were thirty-five miles laid and then about five miles of extensions, and it is on this that I base my answer. I do not think that the pipes and mains of the Bienville Company traverse

most of the populous parts of the city of Mobile; there are a number of streets thickly inhabited upon which they have no pipes at all. About forty per cent. of the people of Mobile are probably reached by the mains and pipes of the Bienville Water Supply Company. I have stated there are miles of streets in the city upon which the dwellings of its inhabitants abut and upon which the Bienville Company has no mains; from memory I can name the following streets upon which they have no mains at all: North of Dauphin there are no mains on Joachim street, none on Franklin street, none on Hamilton, none on Cedar street, none on Lawrence street, no main on Dearborn street north of Dauphin, none on Wilk-
220 inson street, none on Scott street, none on Jefferson; on Broad some main pipes were laid upon condition that for the amount laid the city would put two fire-hydrants on the extension and pay for same; there is no main on Pine street north of Dauphin, none on Georgia avenue, none on Ann street, none on Julia street, and there is no main on Lafayette street north of Spring Hill avenue. A thickly populated street is the old Shell road from Ann to Broad, and this has no water main; there is no water main on Caroline avenue from Common to Ann street. There are other streets north of Dauphin besides those mentioned, but which I cannot think of just now. South of Dauphin street the following-named streets have no mains upon them of Cthe Bienville ompany, viz: Church street from Old Grave Yard out to the city limits, none on Palmetto street, none on Augusta street, none on Savannah street, none on Selma street, none on Elmira street; there is an extension which was put on parts of New Jersey and on Texas streets, but in order to secure the extensions the city had to pay for a fire-hydrant on every five hundred feet at fifty dollars per annum; south of Government and east of Broad there is no main on Jefferson street; there is no main on Scott street, none on Wilkinson street, none on Warren street, no main on Cedar street, none on Hamilton south of Madison street, none on Franklin street, and there is no main on Marine street south of Government street. There are so many others, not centrally located, upon which there are no mains that I can't think of them all at this time.

Cross-int'y 3. Has the city ever demanded of or applied to the Bienville Water Supply Company to extend its mains; if so, when and where and to whom was this application made? Of whom was such demand made and by whom? Was it made by you? If made by anybody else, state by whom, and if you were present and heard such demand or application, state what was said on both sides and give the time and place.

In answer to the third cross-interrogatory he saith: The city has never applied to the Bienville Company for an extension of its mains only through my recommendations for fire-hydrants; these applications or recommendations for fire-hydrants were made by me to the general council of the city of Mobile. The Bienville committee would be notified by committee No. 4 after my recommendation for fire-hydrants were adopted that such extensions were
221 demanded, and that the city would pay for a fire-hydrant fifty dollars per annum every 500 feet, as it was understood under

the terms of the contract the city was compelled to do this in order to secure such extension. I have answered fully as to who made the applications or demand for extension, but I do not remember when these demands were made by said committee No. 4, having in charge matters pertaining to the fire department, but several extensions have been made in the last six or eight years, and always upon condition that the city ordered and paid for a fire-hydrant every five hundred feet, and in fact, so far as I know, no extensions of mains (six-inch pipe) was ever made unless the city took a fire-hydrant.

Cross-int'y 4. If you say such refusal was made by the water company, then state if the owners of three-fourths of the improved property of the square where said parties lived demanded or requested the pipes or fire-plugs to be placed on said square. If so, name the square and the people. Do you know what are the provisions of the contract between the city and the Bienville Water Company on this point of extending its mains or pipes? If so, state what it is.

In answer to the fourth cross-interrogatory he saith: I do not know whether three-fourths of the property-owners living on a square demanded or requested the pipes or plugs to be extended or placed upon said square, but the fire-hydrants were placed where there was a scarcity of water for fire purposes. If I remember correctly, the contract between the city and the Bienville Company provides that wherever extensions are made to their original system that the city must take and pay fifty dollars per annum for a fire-hydrant every five hundred feet, and nothing less than a six-inch main is sufficient for a fire-hydrant. I have frequently recommended and the council has authorized an extension of fifteen hundred feet, and the city had to take and pay for three hydrants in those cases on each fifteen hundred feet.

Cross-int'y 5. Is not the city running the Stein water works and furnishing water to customers for pay? How many customers patronize the Stein Water Company? Is not the water so furnished just as good for drinking, washing, cooking, and other uses about a house for a family as the Bienville water? Is not the only substantial difference between the two water systems a mere
222 question of pressure? If not, what is it? Do you not know that Mr. Stein always competed with the Bienville Water Company in furnishing water to consumers, and that the city does and has done the same thing since it took possession of the works? Did not Stein furnish this water at a lower price than the Bienville Company? Does not the city continue to do the same thing? Cannot the Stein water works be run so as to furnish water at a much lower expense than the Bienville works? Are there not some one thousand consumers still patronizing the Stein works? State how many there are according to your best information.

In answer to cross-interrogatory five he saith: I think the city is running the Stein water works and furnishing water to customers for pay, but I do not know how many customers patronize said works. I think the water furnished is just as good for drinking,

washing, and domestic purposes about a family as the Bienville water. The difference between the two systems of water works is a question of pressure, and also the supply or quantity of water to be obtained from the mains and pipes of the respective works; also the physical condition of the works, the supply of the Stein works being insufficient, as stated in answer to the direct interrogatory. Stein was competing with the water works in furnishing water to consumers, and I expect the city is doing the best they can with the works. I don't know what price Stein charged for his water nor do I know what the city is charging. I think the Stein works can be run at a much lower expense than the Bienville works, but there is a large difference between the two systems, one having a large boiler-houses and engines and the other having a small pump to look after; one carries about eighty pounds pressure on its mains and the other (Stein's) about fifteen or twenty. I do not know how many customers there are now patronizing the Stein works. Since the city has taken charge of the Stein works, there have been a great many of Stein's customers which have gone to the Bienville Company because they cannot secure sufficient water from Stein's system.

Cross-int'y 6. Had M. T. Lewman & Co. laid any pipes in the city of Mobile on the 14th day of September, 1898? Had they any pipes in Mobile at that time? Was not their contract to build those water works based on the condition that the legislature would grant the city authority to issue bonds to pay for such works? Was
223 not this authority granted to the city in November or December, 1898? Was it not granted on the 30th day of November, 1898? Do you not know that M. T. Lewman & Co. never contracted for any pipes and never brought any pipes to Mobile until after this date? Is it not a fact that M. T. Lewman & Co. never brought any pipes to Mobile until January or February, 1899? When did they first bring any such pipes to Mobile?

To cross-interrogatory six he saith: I don't think that Lewman and Company had laid any pipes in the streets of Mobile prior to September 14th, 1898, and I do not think they had any pipes in Mobile at that time. Their contract was based upon condition that the legislature would grant the city the authority to issue bonds to pay for such works. The authority to issue bonds was granted to the city on the thirtieth day of November, 1898. Lewman and Company did not bring any pipes to Mobile, so far as I know, until after November 30th, 1898. It was some time in December, 1898, according to my best information, that Lewman and Company first brought pipes to the city of Mobile.

MATHEW SLOAN.

Certificate.

I, the said commissioner named in the commission hereto annexed and made a part hereof, hereby certify that under and pursuant thereto I gave the written notice herein contained to solicitors of record for the complainant in said cause, solicitor for defendant expressly waiving notice, and that in strict accordance with said writ-

ten notice I began the examination of the witnesses named in said commission, to wit, E. M. Robinson, A. Sidney Lyons, J. C. Bush, C. B. Percy, D. M. N. Ross, and Mathew Sloan, on the 7th day of June, 1899, as in said commission directed, commencing at 5.30 p. m. on said day, there being present at the time and place of examination of the witnesses Mr. R. H. Clarke, of counsel for the complainants, and Mr. B. B. Boone, of counsel for the defendants, and that the examinations were duly adjourned, from time to time, as appears in the above and foregoing pages, by and with consent of counsel for the respective parties to the cause; that each of said witnesses was by me first duly sworn to speak the truth, the whole truth, and nothing but the truth in answer to the questions propounded to them; that thereupon the said witnesses each
224 were examined upon the written direct and cross interrogatories attached to said commission, and in answer to the same testified as hereinabove set out; that the answers of the witnesses were by me reduced to writing in the presence of the witnesses, and as near as might be in the exact language of the witness-, and afterwards the same was carefully read over by the said witnesses and then signed by them in my presence.

I further certify that I am not of counsel or kin to either of the parties to the cause, nor am I in anywise interested in the result thereof.

F. O. HOFFMAN,
Commissioner.

Filed June 12th, 1899, and published by order of court this November 28th, 1899.

RICH'D JONES, *Clerk.*

Deposition of John Craft.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama.

BIENVILLE WATER SUPPLY COMPANY
vs.
CITY OF MOBILE ET AL. } No. 209.

To Francis O. Hoffman, Esqr., Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you and by these presents do give you full power and authority to examine John Craft as witness in a cause pending in our said court, wherein Bienville Water Supply Company — plaintiff and City of Mobile *et al.* defendant-.

And therefore we command you that without delay you do cause the said John Craft to come before you or either of you and then and there examine him on oath as a witness in the cause aforesaid, upon the interrogatories and cross-interrogatories hereto annexed and that you or either of you do take such examination and reduce

the same into writing and return the same, annexed to this writ, closed up under your seals or the seal of any one of you, into our said circuit court with all convenient speed.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court,
225 the 28th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Issued the 28th day of July, A. D. 1899.

Attest:

[SEAL.] RICH'D JONES,
Clerk Circuit Court, Southern District of Alabama.

Deposition of John Craft.

In the Circuit Court of the United States for the 5th Judicial Circuit and So. Dist. of Alabama.

BIENVILLE WATER SUPPLY CO.
vs.
THE CITY OF MOBILE ET AL.

Under and pursuant to the commission hereto annexed, issued out of this honorable court, after giving notice of the time and place of examination to Hon. D. P. Bestor, solicitor for the complainants in said cause, the witness John Craft was examined by me on this 31st day of July, 1899, at 12 m.

The witness JOHN CRAFT, being first duly sworn, deposes and says:

Direct.

Interrogatory No. 1. Are you a member of the general council of the city of Mobile, when were you elected, and when does your present term of office expire?

In answer to the first direct interrogatory he saith: I am a member of the general council of the city of Mobile. I was first elected to the general council in 1876, as a representative from the seventh ward, in what was known as the Hurtel administration. I was a member of the Rich government and Lavretta government, and also took office beginning in March, 1897, and my present term will expire the fourteenth of March, 1900.

Interrogatory No. 2. Please state whether or not you are chairman of the finance committee of the general council of the city of Mobile. Please state how many of the water-works bonds had been issued on February 20th, 1899, by the city of Mobile, under the authority to that end conferred by that certain act of the General Assembly of Alabama entitled "An act to authorize the city of Mobile to make and issue bonds for building, purchasing, or otherwise acquiring systems of water works and sewerage for said city, and to
226 mortgage said works to secure said bonds," approved November 30th, 1898. Please state to what firm said bonds so issued were sold and delivered.

In answer to the second direct interrogatory he saith: I am a member of the finance committee of the general council of the city of Mobile. My recollection and information is there were about sixty thousand dollars of the water-works bonds issued under the authority stated in said interrogatory, issued up to February 20th, 1889, this being the amount authorized under the resolution adopted by the general council at its February meeting. The bonds so issued were sold and delivered to Sperry, Jones and Company, of Baltimore, Md., they being the highest bidders therefor.

Interrogatory No. 3. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

In answer to the third direct interrogatory he saith: I have been for several years an advocate of municipal ownership of sewerage, and the last three or four years have thought the health and happiness of the city could be best served by public ownership of water works, and have been a strong advocate of buying or acquiring the Bienville and Stein water works, and have been willing to allow a reasonable valuation for said water works, and would have gone so far as to have been willing to vote fifty to seventy-five thousand dollars more than the appraised valuation of the Bienville water works if it could have been acquired, but I understood their figures and their proposition to sell was several times above its value; this proposition, however, came officially to the general council. As I understood it, they wanted a million of dollars, to control the revenue for ten years, and the city was to extend the mains at its own expense, and it would have required something like over sixty miles to have laid mains to give the inhabitants water throughout the city. If my recollection serves me right, I did vote to receive and file some such proposition, but at that meeting the city of Mobile had already entered into contracts for the building of an entire system of sewerage and a system of water works, and had also sold the $750,000.00 of bonds for the construction of water works and sewerage.

227 As a tax-payer and a member of the city council I feel that the citizens will have a bountiful supply of water cheap and an entire system of sewerage which will insure health and happiness and give its citizens water very much cheaper than it has ever had heretofore. It is a well-known fact that near two-thirds of the city had no water mains laid through its streets and many houses without water, and numerous — had to get their supply either through a drove well or a dug well.

My recollection is that the extension of the mains in the proposition from the Bienville Company to sell were to be paid for by the city; that the Bienville Water Company was to divide one-half of the net revenue derived from extensions which the city was to lay.

Cross:

Cross-int'y 1. Did you not know on September 13th, 1898, and previous to that time that the Bienville Water Supply Company objected to the building of other water works in Mobile by the city? Did you not know on said date and previously thereto that the Bienville Water Supply Company objected to the city issuing bonds in order to pay for the building of water works? Have not you and the city officials known these facts from the beginning of this water-works litigation? Have you and the city officials not known these facts ever since August, 1897, and in fact all the time.

In answer to the first cross-interrogatory he says: No; I did not know on September 13, 1898, and prior thereto that the Bienville Water Supply Company objected to the building of other water works in Mobile by the city. I knew from the newspapers of a suit being filed, and saw the city attorney and asked him the nature of the suit, and he informed me that the Bienville water works had instituted suit to prevent the city from issuing bonds. At that time the city had issued no bonds. I can't answer for the knowledge of the city officials, but I have not known these facts from the beginning of this water works agitation or ever since August, 1897, as interrogated about.

Cross-int'y 2. Were you not an active supporter of this plan of the city owning its own water works, and did you not talk with the city officials and the officials of the water works company during such dates about these new water works, and especially in
228 July, August, and September, in 1898, on these subjects? Did not Mayor Bush and Mr. E. B. Kirkbride, the president of the general council, know during these dates that the Bienville Water Supply Company objected to the city constructing its own water works? Did not all or nearly all of the city council know this, and has not this matter and this objection been frequently discussed at the meetings of the council previous to November, 1898? Is not Mr. J. C. Bush the mayor of Mobile, and is not Mr. E. B. Kirkbride the president of the general council, and did they not hold these offices in 1897 and 1898 and 1899?

In answer to the second cross-interrogatory he saith: I was an active supporter of the plan of the city owning its own water works. I did not talk with the city officials and the officials of the water works company during July, August, and September, 1898. I did not have the pleasure of meeting any of the officials of the water works company during that time.

I can't answer as to what Mr. Bush or Mr. Kirkbride knew about this matter interrogated about, as I had no conversation with them upon the subject.

I have no recollection of any discussion of the question by the general council previous to November, 1898. I had no conversations with the members on the subject and don't know what their knowledge was on the matter.

Mr. J. C. Bush is mayor of the city of Mobile, and Mr. E. B. Kirkbride the chairman of the general council, and they held such offices in 1897, 1898, and 1899.

Cross-int'y 3. Have you not frequently stated that the city could pay the interest on these water-works bonds whether it made any money or not from the new water works? Did you not so state this to some parties representing capitalists who proposed to bid on the bonds? Have you not made these statements several times and repeatedly when you were trying to sell and negotiate the bonds?

In answer to the third cross-interrogatory he saith: I have stated that the city in the construction of their system of sewerage, that the revenue therefrom and the saving of the money paid for fire purposes and with the economic administration of the city's
220 affairs that the city could pay the interest on the bonds offered for sale for the construction of the sewerage and water works which are being constructed, and still am of that opinion.

I don't recollect whether I stated this to capitalists or their representatives who proposed to bid on the bonds, but I have stated something to that effect in a printed circular and to several parties at various times.

Cross-int'y 4. Have you not known all the time that the Bienville Water Supply Company objected to the city building its own water works? Have you not tried in every way you could to injure the Bienville Water Company and to injure its income? Have you not opposed every plan or proposition by which it should be paid for its property by the city instead of ruining it by the city? Did you not publish over your signature, as chairman of the finance committee of the general council of the city of Mobile, the resources of the city of Mobile, showing it could pay the interest on these bonds proposed to be issued by the city, whether it made any money out of the new water-works plant or not? Was this and these publications true or not? Were you mistaken or not when you made these publications?

In answer to the fourth cross-interrogatory he saith: I have not known all the time that the Bienville Water Supply Company objected to the city building its own water works; the only information to that effect is the suits I have read of being filed by said company.

I have not tried in every way that I could to injure the Bienville Water Supply Company and injure its income, unless the fact that I am trying to have city ownership of sewerage and water works, where I and other citizens would get a bountiful supply of water cheaper to flush our sewers than the present rates that I have to pay for it.

I have never known of any proposition or plan but one, which I have stated in this deposition, but, to the contrary, I have as a business man been willing, as well as a city councilman—to have been willing to treat with the Bienville water works, as well as the Stein, and would have voted for more than the appraised value if it could have been accomplished, but I would have been opposed to have consented to give several times more than its value for
230 the acquiring of the Bienville water works, as its mains did not cover much over forty per cent. of the area of the city.

I did, as chairman of the finance committee, publish my individ-

ual opinion that I thought the resources were ample of the city to pay the interest on said bonds, whether the city got patronage or not, and that during its construction, with no income, that the city would be able to provide for the interest on the bonds, as its resources were ample. According to my judgment the publications were correct. I don't think I was mistaken when I made these publications.

JOHN CRAFT.

I, the said commissioner, hereby certify that under and pursuant to the said commission issued out of the honorable circuit court of the United States, hereto annexed, and in accordance therewith I caused the witness therein named, John Craft, to come before me, at my office, in the city of Mobile, on this 31st day of July, A. D. 1899, at 12 m., notice of the time and place of such examination having been given Mr. D. P. Bestor, solicitor for the complainants in said cause; that after swearing said witness to speak the truth, the whole truth, and nothing but the truth in answer to the direct and cross interrogatories propounded to said witness, and which are hereto annexed, the said witness answered as set forth in said deposition; that the answers of the witness were reduced to writing by me as near as might be in the exact language of the witness, and, being afterwards read over by the witness in my presence, the said witness corrected the answer on page two of said deposition as thereon appears; that thereupon the witness did sign the said deposition as so corrected.

I further certify that I am not of counsel or of kin to any of the parties to the cause, nor am I in anywise interested in the result of said suit.

FRANCIS O. HOFFMAN,
Commissioner.

Filed July 31st, 1899, and published by order of court November 28, 1899.

RICH'D JONES, *Clerk.*

231 An act for the promotion of the *h*ealth and convenience of the city of Mobile by the introduction of a supply of wholesome water into said city to be used for domestic purposes and the extinguishment of fires (approved January 7, 1841).

SECTION 1. Be it enacted by the senate and house of representatives of the State of Alabama, in General Assembly convened, That the agreement made and executed by and between the mayor, aldermen and common council of the city of Mobile, of the one part, and Albert Stein of the other part, bearing date the 26th day of December, A. D. 1840, be, and the same is hereby fully confirmed.

Articles of agreement, made and entered into the twenty-sixth day of December, in the year one thousand eight hundred and forty, by and between the mayor, aldermen and common council of the city of Mobile, of the first part, and Albert Stein of the second part, witnesseth: That the said mayor, aldermen and common council of

the city of Mobile, for and in consideration of the covenants and agreements hereinafter contained, mentioned and reserved on the part of the said Albert Stein, his executors, administrators and assigns, to be paid, kept, done and performed, have granted, and by these presents do grant unto the said Albert Stein, his heirs, executors, administrators or assigns, the sole privilege of supplying the city of Mobile with water from Three Mile creek for twenty years from the date of this agreement, as well as all the advantages and benefits which accrue to the said mayor, aldermen and common council, from, by or under an act of the legislature of the State of Alabama, entitled an act to incorporate and aqueduct company in the city of Mobile, passed December 20, 1820, and all ordinances and resolutions passed by the said mayor and aldermen of the city of Mobile under and by virtue of the said act, or by the act of incorporation of the said city of Mobile, and the several acts
232 amendatory thereto which in any way or manner relate to the said city water works, or the right to supply said city with water, as well as all the benefits and advantages which accrued to the said mayor, aldermen and common council, or the mayor and aldermen of the city of Mobile, from, by or under an act of the legislature of the State of Alabama, entitled An act to incorporate the Mobile Aqueduct Company, passed December 25th, 1837, to have and to hold the above mentioned and described privileges, together with all and singular the appurtenances unto the same belonging or in anywise appertaining, unto the said Albert Stein, his executors, administrators and assigns, from the date hereof, for, during and until the full end and term of twenty years thence next ensuing.

And the said "mayor, aldermen and common council of the city of Mobile," for themselves, and their successors in office, hereby further covenant and agree, that they will at the expiration of the said term of twenty years, (he, the said Albert Stein, his executors, administrators or assigns, delivering up the said water works and appurtenances in good order and condition), pay to him, his executors, administrators or assigns, their actual value, as determined by six arbitrators, three to be chosen by the mayor, aldermen and common council of the city of Mobile, and three by the said Albert Stein, his executors, administrators or assigns; provided, that the said arbitrators shall not be members of the corporation of the city of Mobile. If they agree, and so report in writing, their award shall be binding on the respective parties; but in case of disagreement, the value of the works shall be left to the watering committee of the city of Philadelphia, or such committee of the city of Philadelphia, by whatever name, as may be charged with the water works of said city, whose decision and award in writing, reported to the mayor, aldermen and common council of the city of Mobile, shall be binding and conclusive. The amount so agreed upon shall be paid on the same day on which the said award shall be reported, and the water works and all appurtenances thereunto belonging, shall be delivered over — the corporation of the city of Mo-
233 bile, by the said Albert Stein, his executors, administrators or assigns.

And the said party of the first part, hereby covenant and agree with the said party of the second part, his executors, administrators and assigns, that he, his executors, administrators and assigns, shall have quiet possession of the said works, during their erection and after they shall be completed, for the term of twenty years, and for any further time, until the said parties of the first part, or their successors in office, shall redeem the said works from the said party of the second part, his heirs, executors, administrators or assigns, according to the aforesaid stipulation.

And further, that they shall, as soon as possible, obtain from the legislature of the State of Alabama, an act sanctioning this agreement, and the stipulations thereof, as herein contained, with such other provisions as may be inserted by consent of the said parties.

And the said mayor, aldermen and common council of the city of Mobile, for themselves and their successors in office, hereby covenant and agree, (he, the said Albert Stein, his executors, administrators and assigns, well and truly complying with all and singular the within stipulations and agreements on his part, to be done, performed and complied with,) that he and his executors, administrators and assigns, shall and may retain quiet possession of the said water works, for the said term of twenty years, without let, molestation or hindrance of the said mayor, aldermen and common council, or their successors in office, or any person or persons claiming by, through or under them.

And the said Albert Stein, his executors, administrators and assigns shall, during the said term of twenty years, or any further time, until said works are redeemed as above stipulated, have the exclusive privilege of supplying to the citizens and inhabitants of the city of Mobile, water from the water works aforesaid, at the sum or price which shall at no time exceed the following rates, to be paid by the persons receiving the water, and payable in advance, to wit:

234 First. For every family consisting of six persons, twenty dollars per annum, and two dollars for every person additional, (and persons from one to twelve years of age to be estimated as two for one.)

Second. For retail grocery stores, where liquor is not retailed, twelve dollars per annum.

Third. For retail grocery stores where liquor is sold in quantities less than one quart, from twenty to fifty dollars per annum.

Fourth. For liquor stores doing the business of drawing off and bottling wine and other liquors, from thirty to seventy-five dollars per annum.

Fifth. For stores without families, offices, &c., twelve dollars per annum.

Sixth. For baths for private families, five dollars each per annum.

Seventh. For a horse, three dollars per annum.

Eighth. For a carriage, three dollars per annum.

Ninth. For the use of ships, steamboats and other water craft, per hogshead of one hundred and twenty gallons, fifty cents each.

Tenth. For coffee-houses, oyster-houses, confectioneries, manufactories, hotels, taverns, boarding-houses, steam mills, tan yards, brick yards, soda shops, livery stables, public baths, bakeries, dyeing, scouring and renovating and other establishments not herein enumerated, may be supplied at an annual charge according to the quantity of water that may be required, on such terms as the parties may agree upon; and further the said Albert Stein, his executors, administrators and assigns, shall have the power to collect and receive from each and every person or persons who shall take and receive water from the water works aforesaid, the foregoing rates or prices per annum.

And further, shall have power and authority to conduct the water from any part of the "Three Mile creek," so called, so that the same may be good and wholesome, he, the said Albert Stein, his executors, administrators or assigns, procuring at his or their expense, the necessary ground for the reservoir, engine and pump house, and that through which the pipes shall pass.

And the said Albert Stein, for himself and his executors, administrators and assigns, doth hereby covenant and agree, to and with the said party of the first part, and their successors in office, that he will introduce the water into the city of Mobile within the space of two years, from the date hereof, so that the said city of Mobile, and the inhabitants thereof, may at all times be supplied with such quantity of water as may be procured through said pipes, so far as they are laid:

And further, the said Albert Stein, covenants and agrees, at all times during the said term of twenty years, to suffer and permit the said mayor, aldermen and common council of the city of Mobile, and their successors in office, to use two fire-plugs, and no more, at all times within the said city, where the pipes are laid down, as often as may be necessary for washing the gutters of the streets, and in case of a conflagration or fire of buildings, as much water as may be necessary from any and all parts of the works:

And further, the said Albert Stein, covenants and agrees, as aforesaid, to surrender up the said water works, and all the appurtenances thereto, to the said mayor, aldermen and common council, or their successors in office, at the expiration of the said term of twenty years from the date hereof—they, the said mayor, aldermen and common council, or their successors in office, paying to the said Albert Stein, the value of the works, determined as before mentioned. And further, the said Albert Stein, for himself and his executors, administrators and assigns, does hereby covenant and agree, to and with the said party of the first part, that he will pay or cause to be paid unto the said mayor, aldermen and common council, or their successors in office, for the pipes which they have on hand, and those laid in the ground, which may be found fit for use, the same rates and prices and on the same terms as pipes of the same size and quality may be procured at, to be delivered in Mobile at the time when the said Albert Stein may take into possession and use the said pipes, now belonging to the said mayor, aldermen and common council.

And further, it is understood between the contracting parties hereto, that as soon as the water is introduced under this agreement, the present water works shall be abandoned and totally discontinued.

And further, the said Albert Stein, doth hereby covenant and agree to place and so arrange the fire-plugs that there shall be four fire-plugs applicable to each square of ground where the pipes are laid:

It is further agreed and understood between the parties hereto, that the party of the second part, his executors, administrators or assigns will grant to the corporation, the use of the water for the city hospital and guard-house, free of charge:

It is further agreed and understood between the parties hereto, that if the party of the second part does not introduce the water into the city within two years, from the date of this contract, he will forfeit not only the privileges and advantages of this contract but also all the improvements and the expenses that he may have incurred; the same to inure to the use and benefit of the city; it is further agreed and understood between the parties hereto that the party of the second part, hereby covenants and binds himself, his heirs, executors, administrators and assigns, in the penal sum of ten thousand dollars, that he will commence the aforesaid works within one month after obtaining the consent of the legislature of the State of Alabama, to the stipulations, agreements and transfers herein made and contained, and that he will prosecute said works to completion with due speed and diligence.

(Signed) EDWARD HALL, *Mayor.*
[L. S.] ALBERT STEIN,
Per pro LOUIS TROOST.

Attest: H. P. ENSIGN, *Clerk*,
Per pro JNO. P. REMY.

237 SECTION 2. And be it further enacted, That all the rights, powers, privileges and immunities, which were granted to the Mobile Aqueduct Company, and to the mayor and aldermen of the city of Mobile, by an act of the General Assembly of the State of Alabama, passed on the 20th day of December, 1820, not inconsistent with the terms of the before-mentioned agreement be, and the same are hereby granted, vested in and confirmed to the said Albert Stein and his assigns.

SECTION 3. Be it further enacted, That all the rights, powers, privileges and immunities which were granted to the Mobile Aqueduct Company and to the mayor and aldermen of the city of Mobile, by an act of the General Assembly of the State of Alabama, passed on the 25th day of December, 1837, not inconsistent with the terms of the before-mentioned agreement, be, and the same are hereby granted, vested in and confirmed to the said Albert Stein and his assigns.

SECTION 4. Be it further enacted, That the said Albert Stein and his assigns by themselves and their agents, shall have full power and authority to use such of the public roads in the county of Mo-

bile as may be in the direct route between the reservoir and the fountain-head of the water works hereby to be erected and the city of Mobile, for the purpose of laying the pipes for conducting the water into said city free from all charge or claim for damage therefor; provided, that the said Albert Stein and his assigns, shall, at their own proper cost and charge, keep and preserve any portion of any of the said public roads, so used by them as aforesaid, in full and complete repair so long as the same may be used by them as aforesaid.

SECTION 5. Be it further enacted, That the said Albert Stein, and his assigns, shall have full power and authority to dispose of any and all of the aforesaid privileges, rights and immunities by deed, and that the said Albert Stein and his assigns may mortgage the said privileges, rights and immunities, by deed, to all and every person or persons whatsoever, and that the grantees of said Albert Stein and his assigns shall take and enjoy all and every
238 right, privilege and immunity which the said Albert Stein might or could enjoy by virtue of the aforesaid agreement, and this act whether the same be granted absolutely or by way of mortgage or pledge.

Approved January 7th, 1841.

Filed December 7th, 1899.

RICHARD JONES, *Clerk.*

239 *Decree Dismissing Cause.*

THE BIENVILLE WATER SUPPLY COMPANY
vs.
THE CITY OF MOBILE ET AL. } No. 209. In Equity.

This cause coming on to be heard was submitted for decree on the pleadings and proof, and the same having been argued by counsel and duly considered by the court, the court is of opinion that the complainant is not entitled to the relief sought.

It is therefore ordered, adjudged, and decreed that the bill of complaint be, and the same is hereby, dismissed, and that the defendants go hence with their reasonable costs in this behalf expended, for which execution may issue.

Made this the 4th day of June, A. D. 1900.

HARRY T. TOULMIN, *Judge.*

Filed this June 4th, 1900, and entered on the minutes, page 771.

RICHARD JONES, *Clerk.*

Petition of Complainant for Appeal.

Circuit Court of the United States for the Southern District of Alabama.

THE BIENVILLE WATER SUPPLY COMPANY, Complainant, vs. THE CITY OF MOBILE ET AL., Defendants. } No. 209. In Equity.

The complainant herein, The Bienville Water Supply Company, feeling itself aggrieved by the rulings of the court made in this cause on the 4th day of June, 1900, and by the decree rendered by the court on said 4th day of June, 1900, dismissing its said bill of complaint, now comes, by its attorneys of record, and petitions this honorable circuit court of the United States for the southern district of Alabama for an order allowing complainant to prosecute an appeal from said final judgment and decree of this court made on said 4th day of June, 1900, to the Supreme Court of the United States under and according to the laws and the statutes of the United States in such cases made and provided, and also that an order may be made fixing the amount of security for costs which the complainant shall give and furnish upon such appeal, and that upon the giving of such security all further proceedings in this court may be suspended until the determination of said appeal by the Supreme Court of the United States; and complainant further prays that this petition for an appeal may be allowed, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

240 Your petitioner, this complainant in this cause, herewith files with this petition assignments of error in said cause; and, as in duty bound, your petitioner will ever pray, etc.

BESTOR & GRAY AND
R. H. CLARKE,
Solicitors for the Bienville Water Supply Co.

Filed June 25th, 1900.

RICHARD JONES, *Clerk.*

Assignments of Error.

Circuit Court of the United States for the Southern District of Alabama.

THE BIENVILLE WATER SUPPLY COMPANY, Complainant, vs. THE CITY OF MOBILE ET AL., Defendants. } No. 209. In Equity.

Assignments of error by The Bienville Water Supply Company, the complainant in the court below, and the appellant in the Supreme Court of the United States, sitting in Washington, D. C.

First. The court erred in refusing the complainant the relief sought.

Second. The court erred in its decree rendered on the 4th day of June, 1900.

Third. The court erred in dismissing complainant's bill, as shown by its decree rendered on the 4th day of June, 1900.

BESTOR & GRAY AND
R. H. CLARKE,
Solicitors for The Bienville Water Supply Company, the Appellant.

Filed June 25th, 1900.

RICHARD JONES, *Clerk.*

Order Allowing Appeal.

Circuit Court of the United States for the Southern District of Alabama.

MONDAY MORNING, *June 25th, A. D.* 1900.

Present: Honorable Harry T. Toulmin, judge.

Minutes, page 782.

THE BIENVILLE WATER SUPPLY COMPANY vs. THE CITY OF MOBILE ET AL. } No. 209. In Equity.

This cause coming on to be heard on the petition filed therein by the complainant, The Bienville Water Supply Company, praying an appeal to the Supreme Court of the United States from the final decree rendered herein on June 4, 1900, and it appearing to the court that said complainant has filed an assignment of errors, as required by the rule of said court, it is therefore ordered by the court that said petition be, and the same is hereby, granted, and that said Bienville Water Supply Company be, and it is hereby, allowed an appeal to the Supreme Court of the United States, and that the bond on said appeal be, and the same is hereby, fixed at the sum of eight hundred dollars ($800.00).

241 *Appeal Bond.*

Circuit Court of the United States for the Southern District of Alabama, Fifth Judicial Circuit, at Mobile, Alabama.

THE BIENVILLE WATER SUPPLY COMPANY
vs.
THE CITY OF MOBILE ET AL. } No. 209. In Equity.

The Bienville Water Supply Company, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the said City of Mobile *et al.* in the sum of eight hundred dollars ($800.00), lawful money of the United States of America, to be paid to the said City of Mobile *et al.*; for the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, firmly by these presents.

Signed and sealed with our seals this the 30th day of June, A. D. 1900.

Whereas in the said circuit court of the United States for the southern district of Alabama, at the May term thereof, on the 4th day of June, A. D. 1900, a decree was rendered by said court dismissing the above-entitled cause out of said court at the costs of the complainant; and whereas said complainant, The Bienville Water Supply Company, has obtained from said court an order allowing it an appeal to the Supreme Court of the United States to reverse the said decree:

Now, therefore, the condition of this obligation is such that if the said Bienville Water Supply Company shall prosecute its said appeal to effect and answer all costs and damages if it shall fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

BIENVILLE WATER SUPPLY COMPANY,
Per W. C. POOLEY, *Supt.* [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO.,
[Seal U. S. F. & G. Co.]
By EDWIN McCARTNEY, *Att'y-in-fact, and*
By JOHN E. MITCHELL, *Att'y-in-fact.* [SEAL.]

(Rev. stamps can.)

Approved this 10th day of July, A. D. 1900.
HARRY T. TOULMIN, *U. S. Judge.*

Filed this the 10th day of July, A. D. 1900.
RICHARD JONES, *Clerk.*

242 *Citation of Appeal.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the City of Mobile and John Curtis Bush, mayor of said city, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, within thirty (30) days from the date hereof, pursuant to an appeal allowed by the circuit court of the United States for the southern district of Alabama, fifth judicial circuit, at Mobile, Alabama, wherein The Bienville Water Supply Company is appellant and the said City of Mobile and John Curtis Bush, mayor of said city, are appellees, to show cause, if any there be, why the decree mentioned in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 10th day of July, A. D. 1900.

HARRY T. TOULMIN,
United States Judge.

[Seal U. S. Circuit Court, Southern District of Alabama.]

Attest: RICHARD JONES,
Clerk U. S. Circuit Court for the Southern District of Alabama.

Service of this citation is hereby accepted and receipt of a copy thereof acknowledged this the 10th day of July, A. D. 1900.

B. B. BOONE,
Solicitor for the Appellees.

(Endorsed:) No. 209. In equity. U. S. circuit court, southern district of Alabama. The Bienville Water Supply Company *versus* The City of Mobile *et al.* Citation of appeal. Issued July 10th, 1900. Filed in my office this 10th day of July, A. D. 1900. Richard Jones, clerk.

243 *Certificate.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Southern District of Alabama, Fifth Judicial Circuit.

I, Richard Jones, clerk of the circuit court of the United States for the southern district of Alabama, do hereby certify that the foregoing two hundred and forty-two pages, numbered from 1 to 242, contain a full, true, and correct copy of the record and all proceedings had in said court, and as the same appear of record and file therein, in the equity cause number 209, wherein The Bienville Water Supply Company is complainant and The City of Mobile and John Curtis Bush, mayor thereof, are defendants.

Seal United States Circuit Court, Southern Dist. of Ala.

Witness my hand and the seal of said circuit court of the United States for the southern district of Alabama, affixed at the city of Mobile, Alabama, this the 21st day of July, A. D. 1900.

RICH'D JONES,
Clerk U. S. Circuit Court for the Southern District of Alabama.

Endorsed on cover: File No., 17,859. S. Alabama C. C. U. S. Term No., 374. The Bienville Water Supply Company, appellant, *vs.* The City of Mobile and John Curtis Bush, mayor thereof. Filed August 4th, 1900.

Office Supreme Court U.S.
FILED
SEP 29 1900
JAMES H. McKENNEY,
Clerk.

No. 374.

Brf. of Bestor for Appellant.

Filed Sept. 29, 1900.

In the Supreme Court of the United States

OCTOBER TERM, 1900.

No. 374.

THE BIENVILLE WATER SUPPLY COMPANY, Appellant,

vs.

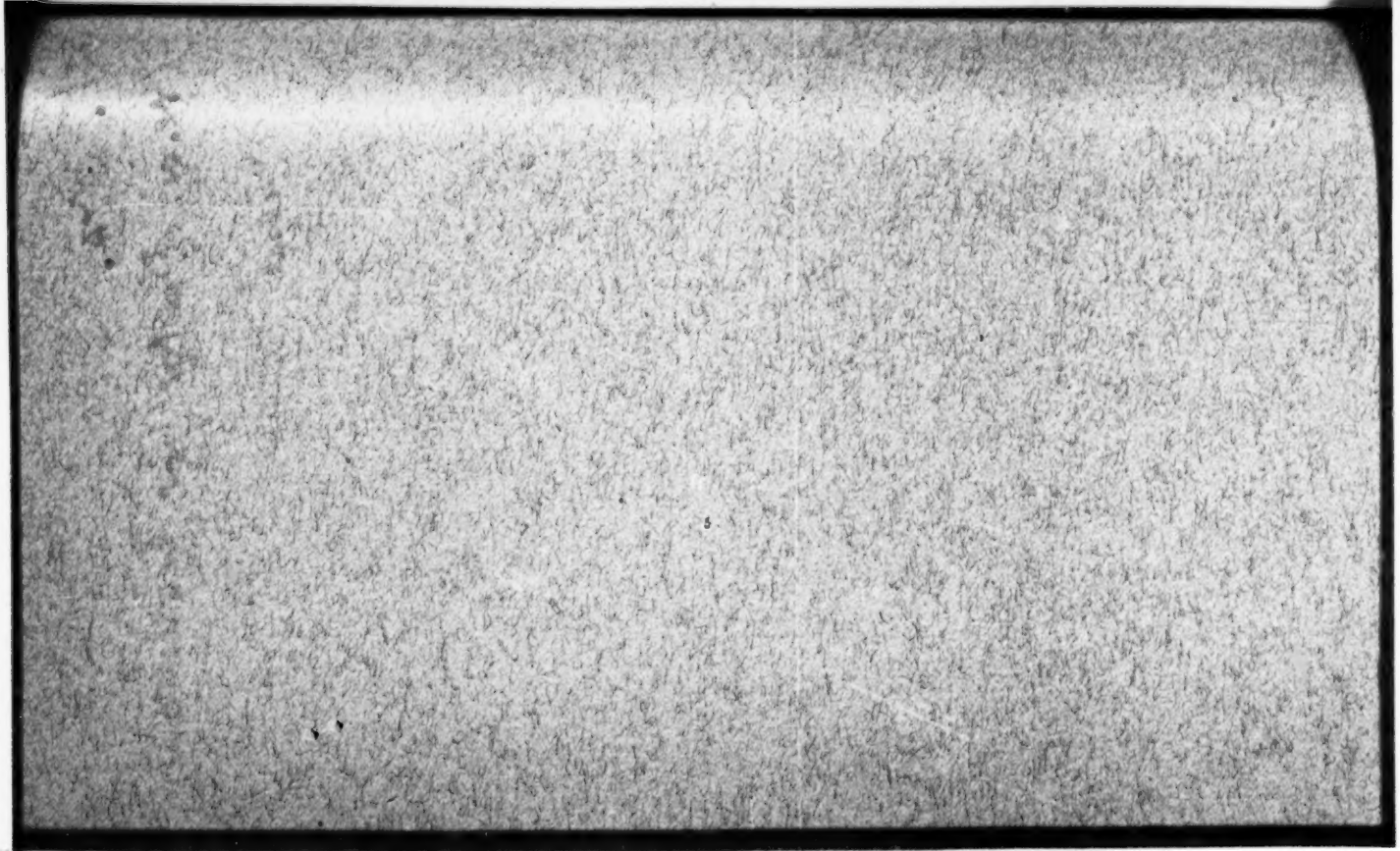
THE CITY OF MOBILE AND JOHN CURTIS BUSH, AS MAYOR, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF FOR APPELLANT.

D. P. BESTOR,

Counsel for Appellant.



In the Supreme Court of the United States

OCTOBER TERM, 1900.

No. 374.

THE BIENVILLE WATER SUPPLY COMPANY,

Appellant,

vs.

THE CITY OF MOBILE AND JOHN CURTIS BUSH, AS MAYOR,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF FOR APPELLANT.

The bill in this cause was filed by the Bienville Water Supply Company, a corporation, against the City of Mobile and its Mayor, on the 21st day of February, 1899. It had for its object the enjoining of the City of Mobile from erecting or operating a system of water works during the 20 years' existence of its charter, or rather, for 20 years from the first day of July, 1888, to-wit, until the 1st day of July, 1908, without complying with the provision of such charter as to arbitration or purchase, or without complying with the constitutional provision of the State of Alabama prohibiting the alteration of its charter, except "in such manner that no injustice shall be done to the corporators."

Constitution of Alabama, Article 14, Section 10.

The application was made to the Circuit Court of the United States to protect the chartered contractual rights of appellant under Article I, Section 10, of the Constitution of the United States, which provides that "No State shall pass any law impairing the obligation of contracts."

Const. of U. S., Article I, Section 10.

The Bienville Water Supply Company was chartered on the 19th day of February, 1883. (Record, p. 71.) The eleventh section of its charter provides: "That said corporation shall have and enjoy the *exclusive* right and privilege of conducting and bringing water from any other source than Three Mile Creek, in the County of Mobile, for the supply of said Port (City of Mobile) for the period of twenty years from the time when said water shall have been brought into and be ready for distribution within the corporate limits of said Port, and till the municipal authorities of said Port—if so by law authorized, shall *purchase* the water works and property of said corporation as hereinafter provided." (Record, page 69.)

Sec. twelve of its charter provides: "That after the expiration of said period of twenty years, in case the General Assembly of Alabama so authorize, the corporate authorities then existing for the government of the territory now known as the Port of Mobile, the said corporate authorities may then purchase the property and rights of said corporation on such terms as may be agreed upon on a valuation to be made by five referees, two to be appointed by said municipal authorities, two by the Bienville Water Supply Company, and one to be selected by the other four referees, but none of said referees shall be residents of the county of Mobile." (Record, page 70.)

This charter was amended and extended on the 14th of February, 1885, but this amendatory act, in section three of the same, still grants to appellant the *exclusive right* of conducting water into Mobile from all sources, other than Three Mile Creek. It makes no change in this *exclusive* grant from the original charter.

Sections 2 and 3 of Amended Act, Record, p. 72.

But said amendment further confers on appellant "all the powers and privileges of private corporations under the laws of the State"—(Alabama.)

Section 1 of Amendment, Record, page 72.

Under these grants from the Legislature of the State of Alabama, the Bienville Water Supply Company issued its six per cent. bonds for $750,000, placed them in the hands of bona fide holders, and thus raised the money and built its water works plant at a cost of over $750,000, made contracts with the city for supplying it with its necessary water for city purposes, and in fact did, for nearly twelve years, supply the City of Mobile and its inhabitants with an abundant supply of pure water.

The contracts made between appellant and the City of Mobile for the supply of water would not expire until the first day of July, 1900. The city began its agitation of owning its own water works by a resolution passed by the municipal board on the 12th day of July, 1897, calling an election to be held on the 2nd day of August, 1897, to ascertain whether or not a majority of the citizens of Mobile would by their votes approve of the General Council's *contracting for, building or purchasing* or otherwise acquiring a system of water works. But nothing definite was done by the city contemplating the *erection* of its own water works until the 5th day of May, 1898, when it applied to the Probate Court of Mobile County to condemn certain lands belonging to Dr. George A. Ketchum, the President of the Bienville Water Supply Company, so as to enable it to get the right of way for its pipes to Eight Mile Creek. This was resisted by Dr. Ketchum, as such president, on the ground that the city had no authority to condemn lands outside of its corporate limits. The city seeing this legal position to be sound, abandoned this suit. The next action it took looking to the erection of its own water works was on the 25th day of June, 1898, by a bill filed in the State Chancery Court to compel Walter Wood, the Treasurer of the Bienville Water Supply Company and one of its stockholders and directors, to accept for his interest in the Stein Water Works $17,298.27, the amount arbitrators chosen by the city and one Stein, in which choice Wood took no part and had no voice, awarded to him for such interest. (Record, pages 73-98.) This cause was removed to the United States Circuit Court, and the city was defeated in this suit.

The appellant then fearing that the city proposed to issue bonds to raise money to erect its water works, filed a bill in the State Chancery Court of Mobile on the 14th day of September, 1898, to prohibit it from issuing negotiable bonds. The city then applied to the Legislature of the State of Alabama in November, 1898, for the passage of a bill authorizing it to issue such bonds. The passage of this bill was resisted by the Bienville Water Supply Company before the legislature and before the committees of both houses. (Record, pages 33, 142, 154, 155.)

This bill authorizing the City of Mobile to issue bonds, and another to buy, provide for and maintain water works, was passed and approved by the Governor on the 30th day of November, 1898.

The City of Mobile obtained from the legislature further legislation by several bills—one authorizing the city to provide for a system of water works and sewerage, approved November 30, 1898; another authorizing the city to condemn the interest of Wood in the city or Stein water works, Wood being the secretary and a stockholder in the Bienville Water Works Company and holding such interest for the benefit of the Bienville Water Company. This bill was approved December 10, 1898. Another bill repealed the exclusive right of appellant, granted to it in its charter. Said bill was approved February 23rd, 1899. All these acts and the ordinance of the city will be more particularly referred to hereafter, in this brief.

The Bienville Water Supply Company objected at all times to the city erecting a new water works plant, but hoped it would under the powers of "contracting for" or "purchasing" water works as provided by its charter and the several acts and ordinances hereinafter referred to in this record, *buy* its works, or submit the question of their value to arbitrators as provided for by the charter of the water company. The appellant at length became satisfied that only the building and erection of new water works were contemplated by the city, which would break down its income and destroy the value of its outstanding bonds and stock, and in fact ruin its property. It then applied to the United States Circuit Court to protect it by this bill filed on the 21st day of Febru ary, 1899.

The errors assigned are:

First. In refusing complainant relief.

Second. In the decree rendered on June 4, 1900.

Third. In dismissing the bill.

They raise all the points and questions to be insisted on in this argument.

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ARGUMENT.

The Legislature of Alabama granted to appellant the exclusive privilege of supplying water to Mobile and its inhabitants except from Three Mile Creek. (Record, p. 69, 72.)

"A grant in its own nature amounts to an extinguishment of the right of the grantor and implies a contract not to reassert that right."

Fletcher vs. Peck, 6 Cranch, U. S., p. 87.

Mr. Webster's argument in Dartmouth College case, 10 Vol. World's Best Orations, page 3860, and many decisions of this court have held that such language creates a contract between the State and the grantee which can not be changed or taken away by the legislature by reason of the prohibition in the constitution of the United States as set forth in Article I, of Section 10.

N. O. Gas Light Co. vs. Louisiana Light Co., 115 U. S., 650.

N. O. Water Works Co. vs. Rivers, 115 U. S., 674.

Binghampton Bridge case, 3 Wallace, 51.

But the constitution of Alabama provides that:

"No ex-post facto law, or any law impairing the obligation of contracts or making any irrevocable grants or special privileges or immunities shall be passed by the General Assembly."

Constitution of Alabama, Article I, Section 23.

But the Constitution of Alabama further provides that "The General Assembly shall have the power to alter, revoke or amend any charter of incorporations now existing, and revocable at the ratification of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of the State: *in such manner, however, that no injustice shall be done to the corporators*"

Constitution of Alabama, Article 14, Section 10, and this court has decided that where the condition of the grant is by the terms of the constitution of the State that the legislature may alter or revoke it, a law altering or revoking it, or which has the effect to alter or revoke the character of such privileges, cannot be regarded as one impairing the obligation of the contract.

Chesapeake & Ohio Railway Co. vs. Miller, 114 U. S., 176.

Hamilton Gas Light and Coke Co. vs. City of Hamilton, 146 U. S., 258.

But it is respectfully submitted that these decisions do not apply to the case at bar, for this decision in 146th United States passed upon the Constitution of Ohio, and the one in 114 U. S., passed upon the Constitution of Virginia, and the Constitutions of Ohio and Virginia have no such clause as Section 10 of Article 14 of the Constitution of Alabama, above quoted.

Our contention is that the legislature has the power to alter, revoke or amend or to pass a law which has the effect to alter, revoke or amend in such manner only as would work no injustice to the corporators. In other words, only by making or providing for just compensation to the incorporators, the company or the stockholders.

The Constitution of Pennsylvania has nearly the same wording of the Constitution of Alabama as to the power of the legislature to alter, amend, &c., for the protection of corporations and invested capital from ruin. The Constitution of Pennsylvania provides that "The general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this commonwealth, in such manner, however, that *no injustice shall be done to the corporators.*"

In the case of Tyrone Gas & Water Co. vs. The Borough of Tyrone, decided in February, 1900, Judge Bell, in commenting on and construing the meaning of this clause of the Pennsylvania corporation, uses this language: "That the water company ought not then to be heard to complain of the legislation allowing the Borough to purchase, since from its very inception, it was subject to such legislation. On the other hand, the Borough has no true ground for fault finding, since by the fundamental law of the land, the constitution itself, confiscation of franchises without compensation to the corporators is prohibited.

"The Borough is not prejudiced by making it pay a reasonable price for the water company's plant. It would have to expend large sums of money to duplicate said works and then the result would be that by building a municipal plant, the value of the private plant would

be destroyed, it would be useless destruction of property without adequate compensation from any point you view the transaction."

Judge Bell's opinion, supra.

The City of Tyrone undertook to build new water works, without purchasing the private water works and without granting any compensation to the private corporation which had been and was still supplying Tyrone with water. The Private water company brought an action to restrain the municipality from doing so under the exclusive privilege of its charter and the court made an injunction perpetual, because the city had made no provision for compensating the corporators.

Tyrone Gas & Water Co. vs. Borough of Tyrone, decided January 24, 1900, and reported in Penn. record, Vol. 1, page 37.

Judge Dean in 177 Pennsylvania, page 651, says:

"If anything be manifest it is that if two water mains be laid side by side in the same street equally accessible to the householder on each side, conveying double the quantity needed with double sets of hydrants, pumping stations, offices, salaries and expenses, one or the other must be abandoned. No community will pay double for any article of necessity or luxury. If the property owned must by compulsory taxation support the private corporation system, such a conflict of interests will inevitably bankrupt the system which depends on the volume and patronage of the public. We hesitate to assume, every court is bound to hesitate before assuming the legislature intends, by grants to distinct corporations for public purposes, there shall arise such conflict in the exercise of the franchise as will result in the practical destruction of property of any citizen without *compensation.*"

And again in 177 Pennsylvania, page 653, Judge Dean says:

"A municipality in its beginning is perhaps not financially strong or its debt may approach the constitutional limit so closely that it cannot borrow; nevertheless, the low state of its financial condition does not render less urgent the necessity of a water supply. It can obtain it in but one way, by contract with those who have the money and are willing to invest their private capital in the construction of water works. The legislature knew capital would not be invested in such an enterprise if in the future it were liable to confiscation by competition with a public enterprise operated from a municipal treasury, capable of replenishment from the pocket of the tax-payer."

Judge Dean then proceeds to point out that the municipality can purchase the plant of the water company by paying a reasonable price therefor, that the right to so purchase is provided by the legislature, and the method of determining what is a reasonable price is within the supervision of the court.

This same principle of providing for just compensation when the legislature takes away or impairs the value of private property for public use (otherwise and without such compensation, such act would be unconstitutional) is passed upon and upheld by this court in

Sweet vs. Richel, 159 U. S., 380.

See also, Brickett vs. Haverhill Aqueduct Co., 142 Mass., 394, 396.

And the above argument also applies to the construction of the latter part of the third section of the amendment to the charter of appellant passed by the legislature and approved February 14, 1885, as set forth on page 73 of the record.

After the legislature again reiterated and confirmed the exclusive privilege grant, it uses these words: "But nothing in this act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the City of Mobile or any other place with water which does not *interfere* with the property rights, or rights of obtaining water pertaining to this company." (Record, page 73.)

The language we construe to mean nothing more than to express the same idea incorporated in article 14, Section 10 of the Constitution of Alabama, viz: provided "no injustice shall be done the corporators." This amendment provides only for the *organization* of a company for the purpose of supplying the City of Mobile with water, but it limits this right so that it must not interfere with the property rights of the Bienville company. This honesty of remuneration to the Bienville company in case the city should in future become able to deem it best to own its own water works, runs through all these possibilities of changes of the corporate grants to the Bienville Company, both in the Constitution of Alabama and by the amendment to the charter of the company so as to render the exclusive grants and privileges not obnoxious to the clause in the Constitution of Alabama,

Article 1 Section 23, forbidding the legislature from making irrevocable grants or special privileges.

But a strict construction of this language (Record, p. 73) it seems to us, would not include the City of Mobile. The legislature has made the grant to the Bienville Company. The very principle and meaning of a grant to another, excludes the right of the grantor to take it back. The City of Mobile, a mere municipal corporation, is but the creature of the State. It has no powers, except those the State gives it. These can be taken away from it whenever the legislature sees fit so to do. and the inhibition of the Constitution of the United States against the impairing of contracts does not include or apply to grants to municipalities. The qualification in the amendment (Record, page 73) is that "nothing in this act shall be construed to prohibit the *organization* hereafter of *any company* for the purpose of supplying water, &c. Certainly the City of Mobile is not a "company" expressed or implied by this language. It could not be afterwards "organized" for it had for nearly eighty years been chartered and organized. The language evidently applies to the possible future organization of some company and certainly not to the City of Mobile, and the City of Mobile can claim no benefit or rights under such amendment.

But the answer of appellee to this legal proposition, incorporated in the fundamental law of the State (Constitution of Alabama, Article 14, Section 10,) is "That all questions in reference to the injury suffered by appellant upon the repeal of the alleged exclusive privilege and the just operation of the act were necessarily matters of legislature discretion and not of judicial determination" and then appellees' counsel refer as authority to this proposition to

101 Alabama, page 65;

60 Alabama, page 278;

Magoun vs. Ill. Trust and Savings Bank, 170 U. S., 283, 298.

It is respectfully suggested that these authorities have no bearing whatever on the principle above contended for by appellant. The first (101 Alabama, 51) is the application to the court for a mandamus to compel

the mayor to administer the oath of office to the chief of police. The court decided that the act to be performed by the mayor was purely ministerial and granted the mandamus. It merely states on page 65 referred to by counsel for appellee, that "The legislative power intended to be vested in the general assembly can not be delegated to any other body, whether such body be of either the other defined departments or not, but must be exercised exclusively by the general assembly." Of course this is horn-book law.

The second (60 Alabama, 278-271,) decides that "An act to authorize the people of a particular county to vote on the question of removing the county site and to permanently locate the same according to their vote is not a 'special or local law for the benefit of individuals or a corporation as those terms are used in the 23rd section of the 4th article of the constitution, and whether the object of such a law can or can not be provided for by a general statute within that provision of the constitution is a question of legislative discretion and not of judicial determination." It will at once be seen that this is a very different proposition from the one we have contended for above.

The third authority (170 U. S., pages 283, 298,) decides that the matter of the amount of property to be exempt from legal process for the payment of debts must depend upon the judgment of the legislature of each State and can not be the subject to judicial review," and that the Inheritance tax law of Illinois makes a classification for taxation which the legislature had power to make, and does not conflict in any way with the provisions of the Constitution of the United States.

Without lengthening this brief by an argument showing the distinction between these authorities and the case at bar, it is respectfully suggested that these authorities present very different propositions of law from the one claimed by appellant, viz: that where the constitution provides (Article 14, Section 10, Constitution of Alabama,) for the alteration, revocation or amendment of a charter, it does it with the condition or limitation that it can be done only " in such manner, however, that no injustice shall be done to the corporators."

In this cause before the court, the legislature has granted new rights and new franchises, to the city, has

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repealed the exclusive privileges granted to the Bienville Water Company, and in fact has done any and everything requested by the city so as to put it in its power to ruin and break down the property of the private corporation which had invested over $750,000 in the water plant, which cost neither the city nor any tax-payer therein one dollar, which powers the city has exercised with the severity not resorted to by fair dealing and which hardly any individual would dare to risk to be tested by any of the rules governing the private dealings among men. The "legislative descretion" relied upon by appellee as forbidding appellant to assert his rights after such open confiscation, would prohibit the courts to inquire into any legislation, no matter how repulsive it should be to Article 1, Section 10 of the constitution of the United States.

Such acts of the legislature and such ordinances and actions of the City of Mobile have deprived appellant of its property without due process of law and without just compensation in violation of the spirit, if not the letter of Article 5 of the amendment to the constitution of the United States. We appeal to the Federal courts, for they alone must decide whether or not the contract has been violated, regardless of State legislation.

McGahey vs. Virginia, 135 U. S., 662, 667.
Gelpcke vs. City of Dubuque, 1 Wall., 175.

SECOND.

The City of Mobile has no constitutional power to engage in the business of selling of water to others for profit, as it is doing.

Article I, Section 37 of the Constitution of Alabama reads as follows:

"That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and when the government assumes other functions it is usurpation and oppression."

Article IV, Section 50 reads as follows:

"The General Assembly shall not have power to authorize any municipal corparation to pass any laws inconsistent with the general laws of this State."

Article IV, Section 54 reads as follows:

"The State shall not engage in works of internal improvement nor lend money or its credit in aid of such, nor shall the State be interested in any private or corporate enterprise, or lend money or its credit to any individual, association or corporation."

Article IV, Section 55 reads as follows :

"The General Assembly shall have no power to authorize any county, city or town, or other sub-division of this State to lend its credit or to grant public money or thing of value in aid of or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company by issuing bonds or otherwise."

A municipal corporation can erect water works for municipal purposes, but it can not go into the business in Alabama of selling water in competition with private capital in the same business. It has been decided in Wolverhampton vs. Bilston, in 1891, 1 Ch., that where the profits of the water works were to be used by the city, that such corporation was a water company supplying water for its own profit, and hence in the business or trade of selling water.

Wolverhampton vs. Bilston, 1 Ch., 315, 29 Am. & Eng. En. of Law, p. 2, note 2.

THIRD.

But appellee claims that appellant has been guilty of laches in not taking action sooner in applying for an injunction.

We understand this rule of equity as to laches to be that "the acquiesence which will bar relief must be such as prove plaintiff's assent to the acts complained of and to the injuries which may reasonably be anticipated to flow from such acts."

1 High on Injunctions, Section 10.

About a strong a case as we find upholding the principle of laches depriving a litigant of his rights, is that of the Penn Mutual Life Ins. Co. vs. Austin, 168 U. S., 685. In that case the court, on page 699, say "From the time of the submission to the vote, and of the ordinances issuing the bonds and directing the work to be done, all in 1890, until this bill was filed in 1895, (five years) no legal steps whatever appear by the bill to have been taken to prevent the consummation of the wrong which

the bill alleges was necessarily to result from the action of the municipal authorities." Page 699.

In Spudel vs. Henrici, 120 U. S., 377, 387, this court said: "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. A court of equity said Lord Camden, has always refused its aid to stale demands, where the party slept upon his rights and acquiesced for a *great* length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable dilligence."

The action of appellant comes under no rule of laches when measured by these standards. When the election was held in July, 1897, the Bienville Water Supply Company believed and had a right to believe when measuring men's actions by common, fair dealing and honesty, that under the authority of the charter of the city to "contract for" or "purchase" water works, and the provision of the Constitution of Alabama, that they could not be deprived of their chartered rights, except by proper remuneration, that the city would purchase or provide for its remuneration. When the city applied to the Probate Court of Mobile county to condemn certain lands for water purposes, it then saw the probable action of the city and began to contest the city's right to build new works and destroy appellant, and through its president defended and defeated this effort of the city.

Charged in the bill, Record, page 7, and admitted in answer; Record, bottom of page 29.

When the city then attempted in March, 1898, to secure the interest of Walter Wood, the Treasurer of the Bienville Supply Company, in the Stein water works, which interest Mr. Wood held for the interest of the Bienville Company, this was resisted by Mr. Wood and defeated by him. (Record, p. 73-98.)

When the city then proposed to issue bonds to build its own water works, the appellant filed a bill in the Chancery Court on the 14th of September, 1898, to prohibit the city from so doing. (Record, page 121.)

When the city, through its representatives, in November, 1898, applied to the legislature for several bills authorizing the city to issue bonds, condemn property

and to do any and everything to break down the value of the property of appellant, appellant still again resisted this drastic legislation. (Record, pages 33, 142, 154, 155.)

The proof shows that the Bienville Water Supply Company has at all times and in every way by offers of arbitration as to price, by objections from time to time, of the city's actions, by expostulation and legal proceedings, endeavored from the beginning of the agitation of the water works question to get the city to buy or arbitrate, made objections to the city building new water works and thus necessarily ruining appellant's property. (Record, bottom of page 108, top of page 109) so the principle of laches as construed by the authorities above cited, can not be applied to appellant, which after exhausting every other effort and remedy, applied to the court for an injunction on the 21st day of February, 1899. Record, page 18.

FOURTH.

But we have had notice of a motion filed in this cause by appellee to dismiss or affirm. We presume this motion is under rule sixth, sub-division 5 of this court. This rule provides that such motion must be "on the ground that although the record may show that this court has jurisdiction, it is manifest the writ of error or appeal was taken for delay only, or that the question on which the jurisdiction depends is so *frivolous* as not to need further argument."

The bill is filed to restrain the city under powers derived from the legislature from violating its chartered rights under Article I. Section 10 of the constitution of the United States, and Article V of the amendments to to the constitution of the United States. It claims that even if appellant's exclusive rights and special privileges are prohibited by the constitution of Alabama, yet that after being given by the legislature of Alabama, they can not be taken away or impaired except it shall be done "in such manner however that no injustice shall be done to the corporators."

Article XIV, Section 10 of Constitution of Alabama, supra.

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Then it must be manifest that the appeal was taken, First, for *delay only*, or, Second, that the question of impairing or violating its chartered rights, or of depriving it of its property without due process of law, is so *fricolous* as to need no further argument.

FIRST. How can it be plausibly contended under the facts in this cause that the appeal is taken for delay only? The application for an injunction or restraining order has been denied by the court and the bill has been dismissed on its merits by the United States Circuit Court. No damage has been done or can be done to appellee by the delay until appellant can get the superior judgment of this august court. The city is left free to proceed to erect water works, sell water from the Stein works, and is not and can not be interfered with in any way by appellant. Then how can the city be injured, or the Bienville Water Company be benefitted by delay until this cause can be regularly reached, and appellant can get the judgment of this court as to its rights, after hearing argument and after due consideration? If there had been a moneyed decree rendered against the appellant, or a restraining order or an injunction against appellee, or any other order had been made by the court whereby the city could be injured by delay or time, then we can see how, under this rule, this motion to dismiss or affirm might be entertained by the court. Nothing has been accomplished by the bill, no harm or damage has been or is being done to the city, so that the proposition that the appeal was taken for "delay only" is not at all sustained by the facts of the cause. SECOND. Then is the question on which the jurisdiction depends "so frivolous as not to need further argument?"

It is settled law that a motion to affirm will not be entertained unless there is a *color* of right to the motion to dismiss.

Davis vs. Corbin, 113 U. S., 687.

Ackley School District vs. Hall, 106 U. S., 428.

Micas vs. Williams, 104 U. S., 556.

Hinckley vs. Morton, 103 U. S., 764.

Whitney vs. Cook, 99 U. S., 607.

We contend, therefore, that there is no color of for the dismissal of this cause. Should the court ever, entertain this motion to affirm, then we present the following in opposition to the granting of such motion:

The legislature granted to the Bienville Supply Co. the exclusive right to supply water to the city and its inhabitants. The constitution of Alabama guards the rights of these corporators who invested this large amount of money in the water works by prohibiting them from being taken away from them except "in such manner that no injustice shall be done to the corporators." Supra.

In other words, the Water Company can not be deprived of its franchises and property without making compensation to the Water Company. The city can either arbitrate as to the value of the water works, or buy them. The city proposes to do neither, but by its politicians sent to the legislature has secured the most drastic laws which necessarily result in the absolute ruin and confiscation of appellant's property, viz: An act to authorize the City of Mobile to issue bonds to purchase or otherwise acquire water works, approved November 30, 1898. (Record, page 41.)

2. An act authorizing the City of Mobile to provide, maintain, etc., water works, approved November 30, 1898. (Record, page 43.)

3. The exclusive privilege and grant to the Bienville Company conferred in 1885 by its charter, was taken away by the legislature on the 23rd of February, 1899, (Record, page 21,) and also by act of November 30th, 1898. (Record, page 43.)

4. An act to authorize the City of Mobile for the purpose of aiding in the erection of its municipal water works to condemn by eminent domain the outstanding interest of Walter Wood in the Mobile City or Stein Water Works, approved December 10th, 1898. (Record, page 27.)

An ordinance of the City of Mobile to authorize and provide for the issuance of bonds by the City of Mobile

ıe purpose of acquiring systems of water works, ›ved December 6th, 1898. (Record, page 47.)

So there were four distinct acts of the legislature, having for their object to confer upon the City of Mobile powers necessary for it to act untrammeled in building its own water works and one ordinance of the city, which would necessarily ruin the appellant's property, and in not one of these acts is any provision made for any compensation to be made to appellant for the destruction of the value of its property. It will be noticed that all these bills, except the one of February 23rd, 1899, (passed two days after this bill was filed) and the one authorizing the city to condemn property, contemplated the grant of authority to *buy* water works. It was only after these bills were passed, did the city show its savage feeling of destroying appellant's property without reimbursing it in any way. When such severe and drastic acts, are undertaken by the municipal body which any man who values his own reputation for fair business dealings would scarcely dare to place himself before his fellow man as doing in his own individual person, this high court of equity, we confidently believe, will with great hesitancy, dismiss and thus turn out of court the application of honest men who have spent over $750,000 of their money to the great benefit of the very people who are now ruining their investment merely because they have the aggregated power so to do, on the ground that the "appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

The Irish parliament of James the Second, in 1689, in repealing "The act of settlement," and declaring void all titles to property of Protestants in Ireland, was scarcely more severe in unlawfully depriving his subject of their property than the action of the City Council in this cause, and this act has been condemned by historians as the very worst and most arbitrarily severe measure of the many unlawful and mean things done by that cruel and unjust sovereign.

3 Vol. Macauley's History of England, page 190, et seg.

The question presented is the violation of the solemn contract of the legislature, the depriving appellant of its property without compensation or due process of law. It presents the life or destruction of over $750,000 of property, is not *frivolous* in amount, and presents to the court a serious jurisdictional question, which State courts of high standing have decided in favor of appellant's contention, and hence Counsel will hardly be pronounced "frivolous" for so presenting such a question for the final decision of this court of great standing and of last resort.

Respectfully submitted by

D. P. BESTOR,

Counsel for Appellant.

In the Supreme Court of the United States.

October Term, 1900. No. 374.

Bienville Water Supply Company, Appellant,

vs.

The City of Mobile et al., *Appellees.*

Additional Brief on Behalf of Appellant upon the Motion of Appellees to Dismiss or Affirm.

Without discussing the various points raised by the record, it is submitted that there is one question involved in this case which is clearly not of a character to be disposed of on a motion to dismiss. That question is, whether under a provision of the Constitution of Alabama, allowing an amendment of existing charters, "in such manner, however, that no "injustice shall be done to the corporators," the legislature, after making a grant of certain water privileges for a limited number of years, upon the faith of which a water company expends $850,000, can arbitrarily, without any compensation, or provision for compensation, revoke that grant.

The question arises under the following facts:—

There are two separate plants by which the city of Mobile is supplied with water. The first was the Stein plant, erected under certain statutes which gave the owners the sole right of supplying the city with water from a creek called Three Mile Creek. This supply proving insufficient, the legislature of Alabama, in 1883, passed two statutes (found on pages 66 and 72 of the Record) granting to the Bienville Water Supply Company the exclusive privilege for twenty years of supplying the city of Mobile with water from any other source

than Three Mile Creek, in the county of Mobile, with the right on the part of the city to purchase the plant at the expiration of the time, upon certain terms, and with a provision that the Act should not be construed as prohibiting the organization of any other company to supply the city of Mobile with water which did not interfere with the water rights of the Bienville Water Supply Company. The owners of the Stein plant claimed that their right to supply the city of Mobile was exclusive, but this court, in the case of—

Stein *vs.* Bienville Water Supply Co., 141 U. S., page 67,

held that the exclusive grant under which Stein claimed was limited to the Three Mile Creek, and did not prevent a similar grant to the Bienville Water Supply Company of the privilege of supplying the city of Mobile from the other streams in the county of Mobile.

In pursuance of the statutory authority aforesaid, the Bienville Water Supply Company expended $850,000 in the erection of a plant, and entered into a contract with the city of Mobile, under which it is at present supplying water to the city. In fact, as appears by the opinion of certain equity proceedings, printed on page 99 of the record, the city is compelling, by legal proceedings, the water company to supply water to it by means of this plant, and has obtained an injunction against any discontinuance of the supply. Recently the legislature, without the consent of the Bienville Water Supply Company, amended the Act incorporating it by re-enacting the grant to supply water from any other source than Three Mile Creek, in the county of Mobile, and leaving out the word "exclusive." In other words, the legislature repealed the exclusive grant for the limited time, and upon the terms mentioned in the original Act, and substituted therefor merely a right to take water. This amendatory Act is found on page 21 of the record. It contains no provision for compensation to the water company, or for any other remedy to said company or its stockholders for the taking away of a valuable franchise. Prior to the passage of this Act, another Act had been passed authorizing the city of Mobile to provide, maintain and operate systems of water

works. This Act is printed page 43 of the record. The city of Mobile admits in its answer filed in the cause (page 30 of Record), that it is causing its engineers and surveyors to make surveys, estimates and reports as to a site on Eight Mile Creek (one of the streams within the grant to the Bienville Company) for the location of a reservoir and source of water supply, and that it proposes to establish such system upon Eight Mile Creek and to use its water to supply the city.

There can be no question as to the injustice and hardship of this legislation. The large amount of money expended by the water company was spent upon the faith of a grant which the legislature has now repealed, without any provision for compensation. It is claimed, however, that this is legally unassailable, because of the following provision in the Constitution of Alabama, viz.:—

"The General Assembly shall have the power to alter, re-"voke or amend any charter of incorporations now existing "and revocable at the ratification of this Constitution, or any "that may hereafter be created, whenever in their opinion it "may be injurious to the citizens of the State, in such man-"ner, however, that no injustice shall be done to the corpo-"rators."

Under this clause, the broad claim is apparently made in the brief accompanying the motion to dismiss that the legislature can revoke any grant to a corporation, without making any provision to prevent inevitable injustice to the corporators, and that the words, "in such manner, however, that "no injustice shall be done to the corporators," are not a limitation on the power of the legislature which can be enforced by the courts.

No authority is cited in the brief which supports any such doctrine. This court has held that where, by the terms of the Constitution of a State there is reserved an unlimited power of repeal, alteration or amendment, the charter of a corporation subsequently granted is subject to that condition. The cases, however, in which this has been held have all been cases of an unlimited and unrestricted power of repeal. The present case is one in which, by the terms of the Constitution, there was not granted an unlimited power of repeal, but

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enterprises which have been undertaken
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FRANK P
JOHN G.

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as not to need further

K P. PRICHARD,
G. JOHNSON,
For Appellant.

No. 1286. October Term, 1901.

Office Supreme Court U. S.
FILED
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Clerk.

Supreme Court of the United States.

IN EQUITY.

Filed Oct. 9, 1901.

The Bienville Water Supply Company, Complainant below and Appellant,

vs.

The City of Mobile and John Curtis Bush, Mayor thereof, Respondents below and Appellees.

APPEAL FROM A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

(Record No. 17,859.)

BRIEF FOR APPELLANT.

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FRANK P. PRICHARD,
D. P. BESTOR,
JOHN G. JOHNSON,

SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

The Bienville Water Supply Company, Complainant below, and Appellant,

vs.

The City of Mobile and John Curtis Bush, Mayor thereof, Respondents below, and Appellees.

October Term, 1901.

No. 126.

SUR APPEAL OF COMPLAINANT FROM A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Prior to the year 1885 the city of Mobile was suffering from a wholly inadequate water system. (Record, pages 110, 120 and 144.) Its only source of supply was a plant erected over forty years before by one Albert Stein, under a contract dated December 26th, 1840, and ratified by an Act of the Legislature January 7th, 1841. (Record, page 173.) By this contract and statute, Stein had the

exclusive right to supply the city with water from a stream called Three-Mile Creek, and the city had the right to purchase the plant at a price to be fixed by arbitration. (Record, page 176.) The plant was in 1885 wholly inadequate; there was no proper protection from fire and insurance rates were inordinately high; the city was unable or unwilling to erect its own water works; all efforts to induce the owners to enlarge and improve the Stein plant had failed, and although a number of applications had been made for charters for water companies, capital could not be obtained for the enterprise. (Record, pages 110 and 120.) Finally, under a charter granted to the Bienville Water Supply Company, by two statutes dated respectively February 19th, 1883 (Record, page 66), and February 14th, 1885 (Record, page 72), capitalists were induced to put their money into the enterprise and new works were built. (Record, page 110.)

Briefly stated, the provisions of the two statutes constituting the charter of the Bienville Water Supply Company were:—

1. The company was given all the rights vested by contract or law in the city to purchase the Stein franchise and plant, and for that purpose was to be considered the assignee of the city.

2. The company was given the right to acquire by contract with the owners, the Stein franchise and property, and in case of disagreement with the owners as to price, the right to condemn and take the said franchise and property under the State's right of eminent domain.

3. The company was given for twenty years and until purchase of its plant by the city the exclusive right to supply the city with water from any source in the county of Mobile, other than Three-Mile Creek (the Stein source of supply), and when it should acquire the Stein franchise, it was given the exclusive right from Three-Mile Creek.

4. The company was required to begin its work in four years and supply water within six years. It was required to supply water at a cost to the consumers, not exceeding certain maximum rates fixed by the Act, and to put

fire plugs on any square at the request of the owners of three-fourths of the improved property thereon.

5. After twenty years the city was given the right to purchase the plant of the company at a price to be fixed by arbitration.

With this charter, it was found possible to obtain the necessary capital. The company issued bonds to the extent of $750,000, and spent about $850,000 in the erection of a plant, taking its supply from a creek in Mobile County called Clear Creek. (Record, pages 105 and 107.) This plant proved so satisfactory to the citizens that a public statue was erected to the citizen the most active promoter of the enterprise. (Record, page 110.)

The owners of the Stein franchise endeavored by litigation to prevent the erection of the plant, but a decree in favor of the Bienville Company was affirmed by this Court (Stein *vs.* Bienville Water Supply Company, 141 U. S., 67).

The Bienville Company entered into a six-year contract with the city for the supply of water at less than the maximum prices fixed by the Act (Record, pages 11 and 110), and this contract was subsequently extended for a period which had not expired at the time of the present litigation. (Record, page 15.) The company fulfilled this contract to the letter (Record, pages 107, 118, 126, 135, 146, 165, 166), and no breach of it in any particular has been proved.

Up to the time of the present litigation, the Bienville Company had not exercised the rights given it by statute as assignee of the city to condemn the Stein franchise and plant, and the owners of that plant continued to supply water in competition, although the plant was dilapidated and the force and quality of the water poor. The treasurer of the Bienville Company, however, in its interests, had purchased interests in the Stein franchise and property amounting to fifty-four and twenty-eight one-hundredths per cent., so that indirectly the ownership of the Stein plant was gradually being acquired in the company's interest. (Record, pages 105 and 86.)

By Act of February 6th, 1897 (Record, pages 4 and 81), a new charter was given to the city of Mobile, and by its terms express authority was given to the city to build or acquire public works, subject to the approval of its citizens by a majority vote. On August 12th, 1897, there was submitted to vote and approved by a majority of citizens, a proposition that the city should purchase, build or otherwise acquire a system of water works to cost not exceeding $500,000 and a system of sewerage to cost not exceeding $250,000, to be paid for by bonds secured by a mortgage upon said public works. (Record, pages 5-81 and 48.)

The Bienville Water Supply Company offered to sell its plant to the city at a price to be fixed by a competent board of arbitration, but no such sale was effected. (Record, page 111.)

As has been already stated, the city originally had under its contract with Stein, the right to purchase the Stein plant at a price to be fixed by arbitration. This right had passed to the Bienville Company by the terms of its charter, but notwithstanding this, the City Councils, on February 18th, 1898, after the popular vote above recited, passed a resolution to purchase the Stein plant. (Record, pages 5-81 and 48.) By means of an illegal arbitration, in which the arbitrators for the Stein interests were selected by the minority interests alone, a price of $31,868.58, subject to outstanding obligations amounting to $13,131.42, in all $45,000, was fixed for the Stein plant, and the city, without the consent of the majority interests, took forcible possession. (Record, page 153.) The city, then, on June 25th, 1898, filed against Walter Wood, who was the treasurer of the Bienville Company and who, as has been already stated, had purchased in the company's interests fifty-four and twenty-eight one-hundredths per cent. of the ownership of the Stein plant, a bill in equity to compel him to carry out the arbitration and purchase. (Record, page 73.) The United States Court, however, held the arbitration and purchase illegal, and dismissed the bill. (Record, page 96.)

On September 14th, 1898, a taxpayers' bill was filed by

or at the instance of the Bienville Company to restrain the city from issuing bonds for a water plant on the ground that no legislative authority existed for such issue. (Record, page 121.)

On September 20th, 1898, the city entered into two contracts, one with J. B., H. L. and L. V. Lewman for the erection of a system of water works (Record, page 37), and one with Sperry Jones & Co. for the sale of bonds (Record, page 45). Both contracts were expressly made conditional upon the subsequent securing by the city of legislative authority. (Record, pages 40-47.) No source of water supply was designated in the contracts except that it was stipulated that the city might elect to have the pump house and stand pipe erected on "Eight-Mile "Creek" (Record, page 38), which was a creek in Mobile County, entirely distinct from the "Three-Mile Creek" of the Stein plant. (Record, page 22.)

Up to this point, the State Legislature had not taken any action which affected the respective rights of the city and the Bienville Company against each other. Subsequently, however, the legislature, against the protest of the Bienville Company, passed four statutes attempting to destroy the exclusive rights of the Bienville Company, and deprive it of all water rights under its charter except the use of Clear Creek. These statutes were passed, respectively, two on November 30th, 1898; one on December 10th, 1898 and one on February 23d, 1899 (Record, pages 41, 43, 27 and 21), and under them the city is taking steps to erect water works and to use either Three-Mile Creek or Eight-Mile Creek or both, as a source of supply. (Record, pages 29, 30.)

Briefly stated, these statutes provide:

1. The city is given power to issue bonds secured by a mortgage on the plant. (Record, page 41.)

2. The city is given power to acquire or condemn any property and the water of any stream in Mobile County, excepting only Clear Creek. (Record, page 44.)

3. The city is given power to condemn all interest, legal or equitable, not owned by the city in the Stein plant. (Record, page 27.)

4. The charter of the Bienville Company is amended by striking out the word "exclusive" from the grant of the privilege of supplying water from any other point in Mobile County than Three-Mile Creek and by striking out the provision that when the Three-Mile Creek franchise was secured the right should be also exclusive as to that. (Record, page 21.)

After three of these Acts had been passed, and the day before the fourth one was passed, the Bienville Company filed two bills in equity against the city. The first was based entirely upon its contract with the city and claimed that there was an implied agreement by the city not to enter into competition. This bill was dismissed and an appeal taken to this court was dismissed, and the decree affirmed.

Bienville Water Supply Company *vs.* Mobile, 175 U. S., 109.

The other bill was the one in the present case. It is based upon the charter rights given to the company and claims that any legislation authorizing the city to violate these rights was unconstitutional as violating the obligation of the contract contained in the charter. It sets out the charter: the declaration of the city that it intended to erect water works and take the supply of water from both Three-Mile Creek and Eight-Mile Creek, and the claim of the city that it is doing this under legislative authority and it asks for an injunction. The answer admits the acts complained of, but sets up substantially three defenses, viz.:—

1. That the contract contained in complainant's charter giving complainant exclusive rights was prohibited by the State Constitution.

2. That the State Constitution reserved to the legislature the power to amend complainant's charter and to take away complainant's exclusive rights.

3. That the complainant had been guilty of laches.

The court below, without filing an opinion, entered a decree dismissing the bill. From this decree complainant took the present appeal.

SPECIFICATIONS OF ERROR.

First.—The court erred in refusing the complainant the relief sought.

Second.—The court erred in its decree rendered on the fourth day of June, 1900.

Third.—The court erred in dismissing complainant's bill as shown by its decree rendered on the fourth day of June, 1900.

ARGUMENT.

The important question in this case is whether the State of Alabama has violated the obligation of a valid contract which it made with the Bienville Water Supply Company.

In determining this question, the first consideration is, of course, what was the contract, the breach of which is complained of.

Its terms are to be found in the two statutes constituting the charter of the Bienville Water Supply Company. (Record, pages 66 to 73.)

The substantial rights and obligations imposed by it are to be found in the following sections:—

Preamble (Record, page 66):—

WHEREAS, The inhabitants of the municipality known as the port of Mobile, and the inhabitants of the village of Whistler, in the county of Mobile, are not provided with an adequate supply of water for domestic and municipal purposes:

AND WHEREAS, It is essential to the public health of the citizens of those towns and to the protection of their property

therein against conflagration, that an abundant supply of water should be introduced and furnished to said citizens:

AND WHEREAS, A company of citizens of said county propose to undertake the duty of furnishing such supply to said towns for the public use and benefit:

Section 1 (Record, page 66):—

Be it enacted by the General Assembly of Alabama, That George A. Ketchum, William H. Pratt, A. C. Danner, Thomas Henry, Sr., Duncan T. Parker, William Butler Duncan, Peter Stark, and their associates and successors be, and the same are hereby made a body politic and corporate, by the name and style of the "Bienville Water Supply Company," and as such corporation they are hereby vested with all the powers and privileges of private corporations under the laws of this State.

Section 6 (Record, page 67):—

Be it further enacted, That said corporation is hereby charged with the duty of introducing into the port of Mobile and the village of Whistler, in Mobile County, such supply of pure water as the domestic, sanitary and municipal wants thereof may require. And for this purpose said corporation is hereby authorized to construct all needed canals and ditches, and by pipes and aqueducts as may be found best suited for the purpose, to carry into said towns, by such line or route as may be found best, such water as may be needed, from any point in said county within twenty miles of said port or city of Mobile. In the laying of its pipes and the construction of aqueducts when required, said corporation is hereby authorized to use, free of charge, any and all public roads of the county, and streets of said town, free of charge; but when its pipes are laid in or under said roads and streets, or its other works completed, said corporation shall, without delay, restore said roads and streets to their original condition for use as public highways and thoroughfares, and for the purpose herein and hereby authorized, and to perform the public duty hereby declared, and by the acceptance of this charter imposed upon it. Said corporation shall have the right to enter upon any land of private persons, and therein and beneath the surface thereof to lay pipes for the conveyance of said water, and thereafter to repair and maintain the same; but said corporation shall not enter upon any private lot in said towns without the consent of the owner

thereof, and before entering on any private property, must first pay to the owner thereof such reasonable compensation for its use of said land for the purpose herein duclared as may be agreed upon with said owner, or in case of disagreement, as may be ascertained upon proceedings for that purpose, as directed by law, for the condemnation of private property, or the use thereof, to public use.

Section 9 (Record, page 68):—

Be it further enacted, That the said corporation hereby created is hereby invested with all the rights and powers which by law or contract was vested in the late municipal corporation, known as "the mayor, aldermen and common "council of the city of Mobile," by redemption, purchase or otherwise to acquire from any and all other persons, corporations or associations whatever any and all property and rights by such person or persons, corporations or associations held under any former contract or law for the introduction and supply of water into the city of Mobile, or the inhabitants thereof and for such purpose said Bienville Water Supply Company shall be held and taken to be the assignee of the said "mayor, aldermen and common council of the city of "Mobile," and may proceed to assert said rights and exercise said powers thus assigned, the same as could have been done by the municipal corporation aforesaid; and for this purpose the commissioners of Mobile, appointed under and by virtue of "An Act to vacate and annul the charter and dissolve the "corporation of the city of Mobile," approved February 11th, 1879, are hereby authorized, on the demand of said corporation, to release to said corporation all the rights of said late city of Mobile in and to such right of redemption, purchase or other acquisition of such property or rights.

Section 10 (Record, page 69):—

Be it further enacted, That said Bienville Water Supply Company be and is hereby authorized to acquire by contract with any person or persons, corporation, company or association claiming any right to supply the port or city of Mobile, or the inhabitants thereof, with water, such right or rights as he or they may have in the premises, and the property owned and used in connection therewith, and pay therefor such amount of money as may be agreed upon, or such as may be agreed upon in the stock of the said supply company; and in case of failure by contract to obtain such right and property,

then said corporation hereby created may proceed, as directed by law, for the condemnation and the taking of private property for public use, to obtain the same for the purpose of the public use and benefit herein declared of furnishing the port of Mobile and the village of Whistler, and the inhabitants thereof, with an adequate supply of water for domestic, sanitary and municipal purposes.

Section 11, as amended by Act of February 14th, 1885. (Record, page 72):—

Be it further enacted, That said corporation shall have and enjoy the exclusive right of conducting and bringing water from any point other than Three Mile Creek, in the county of Mobile, for the supply of said port of Mobile and village of Whistler for the period of twenty years from the time when said water shall have been brought within the limits of the port of Mobile, and be ready for distribution and supply to the inhabitants of the port of Mobile, and the houses and dwellings within the limits of said port. And until the municipal authorities of said port and village, if so by law authorized, shall purchase the water works and property of said corporation, as hereinafter provided, but said corporation, within four years from the passage of this Act, must begin its work, and within six years from the date of the passage of this Act must cause water to be conducted into the port of Mobile from some stream, point or place as hereinbefore named, and if when any existing claim to conduct water into Mobile from Three Mile Creek, or any other point without the limits of said port, has been obtained by this corporation, then said corporation shall have the exclusive right to supply said port and village and the inhabitants thereof with water for the period and the term aforesaid. But nothing in this Act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company. In making contracts for labor and materials in the construction of works by this Act authorized, said corporation, by its directors, are hereby empowered to stipulate for payment, in whole or in part, by the issue of shares of capital stock of said corporation to said contractors, but in no event shall the issue of certificates of capital stock exceed the amount of capital hereinbefore authorized.

Section 14 (Record, page 70):—

Be it further enacted, That said corporation be, and the same is hereby authorized to demand and receive compensation for the supply of water it may furnish, at not exceeding the following rates, to be paid by the person receiving the water, and in advance; that is to say. (Here follow certain specified rates.)

Section 15 (Record, page 70):—

Be it further enacted, That said corporation must, without charge, supply all needed water for the use of municipal buildings and hospitals of said port and the jail and the court house of the county, but shall be entitled to have and demand reasonable and proper compensation for all pipes, hydrants and labor necessary to carry the water from the main, passing said buildings to the point where the water is to be used.

This contract was neither an unusual nor an inequitable one. The evidence shows that Mobile was suffering for lack of an efficient water supply. Not only for public convenience, but for public safety and public health a new system was urgently required. The cost of erecting the necessary works was nearly a million of dollars. The city was unable or unwilling to spend the money, and numerous unsuccessful attempts had been made to induce individual investors to provide the necessary capital. These were the attending circumstances as shown by the record and by the preamble to the charter.

Turning now to the contract itself we find the following obligations imposed on the company:—

1. It was "charged with the duty of introducing" the water into Mobile.

2. It was bound to install its plant within a limited time.

3. It was bound to furnish water to the citizens at certain rates and supply certain public institutions free of charge.

4. At the end of twenty years it was bound, if the city so desired, to sell its entire plant to the city at a price to be fixed by arbitration.

In return for these obligations it was given:—

1. The right to furnish water to the city at rates not exceeding those fixed in the Act.

2. The rights previously vested in the city to acquire the outstanding water rights (viz., the Stein rights).

3. The exclusive right for twenty years or until the purchase of its plant by the city, of supplying the city from any source in the county of Mobile, other than Three-Mile Creek (the Stein source), and when it should acquire the Stein rights it was given the exclusive right to supply from Three-Mile Creek.

It is obvious that the acceptance of this charter not only involved the expenditure by the company of a very large sum of money, but the assumption of an onerous public duty, and that the main consideration for this was the exclusive right securing it from competition for twenty years, and until the city purchased its plant.

The language of the charter is significant. It declares (Section 6, Record, page 67):—

> That said corporation is hereby charged with the duty of introducing into the port of Mobile and the village of Whistler, in Mobile County, such supply of pure water as the domestic, sanitary and municipal wants thereof may require.

And later in the same section,

> to perform the public duty hereby declared and by the acceptance of this charter imposed upon it.

It may be said in passing that the Supreme Court of Alabama held that the effect of this language was to impose the duty of supply, whether or not the city kept its contract, and that the company might be enjoined from discontinuing the flow of water to compel performance by the city.

> Bienville Water Supply *vs.* Mobile, 112 Ala., 260, printed in Record, page 99.

No company or individual would have assumed such duties or made such expenditures without being secured

against competition, and the provisions in the charter are carefully framed to accomplish that end. The State could not directly give the exclusive right to supply the city from any source in the county of Mobile since an exclusive right had already been granted to Stein to use Three-Mile Creek. The State could, however, give the exclusive right to every other source within the county, and it could vest in the company the right of the city to acquire the Stein franchise, and the right of the State to condemn it, and once acquired this right could be made exclusive. Accordingly, we find in section 9 (Record, page 68), a provision by which the company is vested with all the right which the city, either by law or contract, had to acquire any rights for the introduction of water into Mobile, and that the company "shall be held and taken to be the assignee of" the city. We also find in section 10 (Record, page 69) a grant to the company of the right to condemn any outstanding right to supply Mobile with water, and in section 11 (Record, page 72), as amended, we find a grant of an exclusive right from all sources in the county other than Three-Mile Creek, and an exclusive right from that when acquired. Stein had by his contract ratified by the legislature, the "sole privilege of supplying the city of Mobile with water from Three-Mile Creek" (Record, page 174), so that the effect of the Bienville Company's charter was to exclude from competition for twenty years, every one but Stein or his assigns, and to give the company all rights which the State or city had to acquire and use the Stein franchise within that time.

It has not been overlooked that the charter contained the clause (Record, page 73)—

> But nothing in this Act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company.

The purpose of this proviso is not very important in view of the fact that no other company has been incor-

porated for supplying Mobile, but it certainly was not intended to destroy the express grant of exclusive rights to streams in the county of Mobile, and it expressly saves the property and water rights of the Bienville Water Supply Company. Probably the clause was introduced because the grant to the Bienville Water Supply Company was for a limited period, and was conditional upon the commencement and completion of the plant within certain periods. The framer of the statute probably wished to exclude any possible construction which would prevent the incorporation of another company if the Bienville Company did not build the works or if its grant expired. At all events the intention is clear not to destroy or restrict the rights previously given to the Bienville Company.

It is settled by repeated decisions of this court that such a contract as that here presented between the State and the Bienville Water Supply Company is ordinarily within the power of a State to make, is founded upon adequate consideration and is inviolable. The general principles governing their enforcement cannot be better stated than in the language of this court through Mr. Justice Harlan in—

New Orleans Gas Light Co. *vs.* Louisiana Gas Light Co., 115 U. S., 650,

as follows:—

If the State can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits, if she may restrict the exercise of the power of taxation by granting exemption from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health or the public safety, to grant

a franchise, to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies.

And on page 670:—

It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation vested with the power and charged with the duty of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, this work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable either that the cost of supplying the city and its people would have been made in some form, a charge upon the public, or the public would have been deprived of the security in person, property and business which comes from well-lighted streets.

This was the case of a gas company, but the same principles were applied to a water company in—

New Orleans Water Works Co. *vs.* Rivers, 115 U. S., 674;

St. Tammany Water Works *vs.* N. O. Water Works, 120 U. S., 64;

the latter a case in which a water company was given an exclusive privilege for fifty years of supplying New Orleans with water from the Mississippi River or any other stream or river. And also in the case of—

Walla Walla City *vs.* Walla Walla Water Co., 172 U. S., 1.

That the obligation of this contract was violated by the State admits of no serious doubt.

The water company performed its part of the contract. It spent $850,000 in erecting works which were completed in 1889. For nine years of the twenty it has performed the public duties it assumed. The evidence would seem to justify its assertion that it performed these duties well, but whether it performed them well or ill, is besides the question. It performed them, and for any dereliction of duty both the State and city have ample remedies. At the end of the nine years the State took away by legislation the exclusive right which was necessarily the main consideration for its contract. That such is the effect of the legislation, cannot be denied. The two Acts of November 30th, 1898, authorize the city to direct its own water works and take its supply from "any stream, creek, "spring or river * * * situated in Mobile County." (Record, page 44.) The Act of December 10th, 1898, authorizes the city to condemn the outstanding interests not owned by the city in the Stein Water Works, viz., the fifty-four twenty-eight one-hundredths per cent., owned by the treasurer of the Bienville Water Supply Company and acquired in its interests. (Record, page 27.) The Act of February 23d, 1889, amends the charter of the Bienville Water Supply Company by omitting the exclusive right to the sources other than Three-Mile Creek, and to Three-Mile Creek when acquired. (Record, page 21, and compare with original Act, page 72.)

The amendment of this last Act can best be shown by putting the original section and the amended section in parallel columns. The words omitted in the amendment being italicized.

Act of 1885.	Act of 1899.
That said corporation shall have and enjoy the exclusive right of conducting and bringing water from any point, other than Three Mile Creek, in the county of Mobile, for the supply of said port of Mobile and village of Whistler, for the period of twenty years from the time when said water shall have been brought within the limits of	That said corporation shall have and enjoy the right of conducting and bringing water from any point, other than Three Mile Creek, in the county of Mobile, for the supply of said port of Mobile and village of Whistler, for the period of twenty years from the time when said water shall have been brought within the limits of the said port of

the port of Mobile and be ready for distribution, and supply to the inhabitants of the port of Mobile and the houses and dwellings within the limits of said port, and until the municipal authorities of said port and village, if so by law authorized, shall purchase the water works and property of said corporation, as hereinafter provided, but said corporation, within four years from the passage of this Act, must begin its work, and within six years from the date of the passage of this Act, must cause water to be conducted into the port of Mobile from some stream, point or place as hereinbefore named, *and if when any existing claim to conduct water into Mobile from Three Mile Creek, or any other point without the limits of said port, has been obtained by this corporation, then said corporation shall have the exclusive right to supply said port and village and the inhabitants thereof with water for the period and the term aforesaid. But nothing in this Act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company.* In making contracts for labor and materials in the construction of works by this Act authorized, said corporation, by its directors, are hereby empowered to stipulate for payment, in whole or in part, by the issue of shares of capital stock of said corporation to said contractors, but in no event shall the issue of certificates of capital stock exceed the amount of capital hereinbefore authorized. (Record, page 72.)

Mobile and be ready for distribution, and supply to the inhabitants of the port of Mobile and the houses and dwellings within the limits of said port, and till the municipal authorities of said port and village, if so by law authorized, shall purchase the water works and property of said corporation, as hereinafter provided, but said corporation, within four years from the date of the passage of this Act, must begin its works, and within six years from the date of the passage of this Act, must cause water to be conducted into the port of Mobile from some stream, point or place as hereinbefore named. In making contracts for labor and materials in the construction of works by this Act authorized, said corporation, by its directors, are hereby empowered to stipulate for payment, in whole or in part, by the issue of shares of capital stock of said corporation to said contractors, but in no event shall the issue of certificates of capital stock exceed the amount of capital hereinbefore authorized. (Record, page 21.)

In taking back this consideration of the contract the State did not proceed under its power of eminent domain. It did not condemn the exclusive franchise of the Bienville Water Supply Company. It merely took it away. It is true it authorized the city to condemn the interests in the Stein Water Works, but there is no provision for the condemnation of the exclusive franchise given by its charter to the Bienville Water Supply Company, which includes the right to acquire and exclusively use the Stein franchise.

The result of this is that while the water company has spent its $850,000, and while it is still under a public duty to supply Mobile with water, its exclusive right which was the consideration therefor is taken away, and it is threatened with competition by the city, which takes its water from the very source of supply given to the company.

What the effect of such competition will be may be well stated in the language of this court through Mr. Justice Brown in—

Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 1-11,

as follows:—

The argument which attacks the jurisdiction of the court upon the ground that the complaint is devoid of facts showing any matter which vests jurisdiction goes rather to the sufficiency of the pleading than to the jurisdiction of the court. Even if this objection had been sustained, the difficulty could have been easily obviated by amendment. We think, however, that it sufficiently appears that if the city were allowed to erect and maintain competing water works the value of those of the plaintiff company would be materially impaired, if not practically destroyed. The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and the citizens would naturally take their water where they could procure it cheapest. The plaintiff, upon the other hand, must carry on its business at a profit, or the investment becomes a total loss. The question whether the city should supply itself with water, or contract with a

private corporation to do so, presented itself when the introduction of water was first proposed, and the city made its choice not to establish works of its own. Indeed, it expressly agreed, in contracting with the plaintiff, that until such contracts should be avoided by a substantial failure upon the part of the company to perform it, the city should not erect, maintain or become interested in any water works except the plaintiff's. To require the plaintiff to aver specifically how the establishment of competing water works would injure the value of its property, or deprive it of the rent agreed by the city to be paid, is to demand that it should set forth facts of general knowledge, and within the common observation of men. That which is patent to any one of average understanding need not be particularly averred.

It has been shown that the State made a contract with the Bienville Water Supply Company, and that it deliberately violated this contract, to the great damage of the company. It remains to be considered what defense is set up to the right which, under ordinary circumstances, the company would have to an injunction against the city from carrying out such legislation.

The defense of the city is twofold, viz.:—

First.—That the contract itself was invalid.

Second.—That by the Constitution of Alabama, the legislature had the right to break the contract at its pleasure, and that the justice or injustice of such breach canot be inquired into by the courts.

Was the contract invalid?

The city relies on this ground upon article I., section 23, of the Constitution of Alabama of 1875, which reads as follows:—

That no *ex post facto* law or any law impairing the obligation of contracts or making any irrevocable grants of special privileges or immunities shall be passed by the General Assembly.

It will be observed that this section does not prohibit the granting of special privileges, but the making of any "irrevocable" grants of such privileges. It must be read in connection with article XXIV., section 1, of the same Constitution, which reads:—

> Corporations may be formed under general laws, but shall not be created by special Act, except for municipal, manufacturing, mining immigration, industrial and educational purposes or for constructing canals or improving navigable rivers and harbors of this State, and in cases where, in the judgment of the General Assembly, the objects of the corporation cannot be attained under general laws. All general laws and special Acts passed pursuant to this section may be altered, amended or repealed.

and with article XIV., section 10, of the same Constitution, which reads:—

> The General Assembly shall have the power to alter, revoke or amend any charter of incorporations now existing and revocable at the ratification of this constitution or any that may hereafter be created whenever in their opinion it may be injurious to the citizens of the State, *in such manner, however, that no injustice shall be done to the corporators.*

It is not necessary to consider whether the rights given to the Bienville Water Supply Company by its charter were "special privileges or immunities" within the prohibition of this Constitution, although it may be pointed out in passing that they were limited as to time, and as to source of supply, and that the Stein privilege which was assigned by the State to the Bienville Water Supply Company antedated the Constitution of 1875. Assuming, for the sake of argument, that any exclusive right given to a corporation for even a limited time or a limited territory is a "special privilege or immunity," it does not follow from the sections above that the privilege is invalid, but only that it is revocable. The effect of article I., section 23, and article XXIV., section 1, was to write into every grant of a special privilege and every character of incorporation a provision that it could be revoked or repealed, and the effect of article XXIV., section 10,

of the Constitution was that if the grant was part of the charter of a corporation it could only be repealed in such manner that no injustice should be done to the corporators.

We thus reach what is the real question in the case, not whether the charter was invalid, not even whether it is revocable, but whether it can be revoked or changed without doing justice to the corporators. Even this question resolves itself into another, viz., Can the courts inquire whether justice has been done? In other words, is the question whether injustice has been done to the corporators a judicial or a legislative question? This is really the only question in the case. It is the one issue which in the last analysis of this case remains.

Did the legislature have the right to break the contract contained in appellant's charter without any right on the part of appellant to invoke the aid of the courts to enforce the constitutional limitation on the legislative power of revocation?

The city, insists in its brief, that the question of whether injustice has been done to the corporators is a question "of legislative discretion," and not "of judicial determina-"tion." The water company insists that it is a question for judicial determination.

The question is one of very great importance, not only in this particular case, but to the country at large.

The origin of the reservation of the right of repeal now as generally introduced in State Constitutions, is stated by this court, speaking by Mr. Justice Gray, in—

Looker *vs.* Maynard, 179 U. S., 46,

as follows (pages 51 and 52):—

By the decision in the leading case of Dartmouth College *vs.* Woodward, 4 Wheat., 518, it was established that a charter from the State to a private corporation created a contract,

within the meaning of the clause in the Constitution of the United States forbidding any State to pass any law impairing the obligation of contracts, and, consequently, that a statute of the State of New Hampshire, increasing the number of the trustees of Dartmouth College as fixed by its charter, and providing for the appointment of a majority of the trustees by the executive government of New Hampshire, instead of by the board of trustees, as the charter provided, was unconstitutional and void.

Mr. Justice Story, in his concurring opinion in that case, after declaring that in his judgment it was "perfectly clear "that any Act of a legislature which takes away any powers "or franchises vested by its charter in a private corporation "or its corporate officers, or which restrains or controls the "legitimate exercise of them, or transfers them to other per-"sons without its assent, is a violation of the obligations of "that charter," took occasion to add: "If the legislature "mean to claim such an authority it must be reserved in the "grant." 4 Wheat., 712.

After the decision many a State of the Union, in order to secure to its legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its Constitution, a provision that charters thenceforth granted should be subject to alteration, amendment or repeal, at the pleasure of the legislature. See Greenwood *vs.* Freight Co., 105 U. S., 13, 20, 21. The effect of such a provision, whether contained in an original Act of incorporation or in a Constitution or general law subject to which a charter is accepted is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs. Sherman *vs.* Smith, 1 Black, 587; Miller *vs.* State, 15 Wall., 478; Holyoke Co. *vs.* Lyman, 15 Wall., 500; Sinking Fund Cases, 99 U. S., 700, 720, 721; Close *vs.* Glenwood Cemetery, 107 U. S., 466; Spring Valley Water Works *vs.* Schottler, 110 U. S., 347; New York & New England Railroad *vs.* Bristol, 151 U. S., 556.

In most of the States in which the power of repeal is not limited to general laws, the framers of the Constitu-

tions or of the amendments to Constitutions, saw that an unlimited power of repeal by special laws would be as injudicious as any other unlimited power to take private property or to violate contracts. They saw that such an unlimited power would discourage conservative investors of capital and might lead to piratical attacks on corporations. Accordingly, they gave not an unlimited power of repeal or amendment, but a limited one. In at least nine of the States, viz., Alabama, Arkansas, Georgia, Pennsylvania, Colorado, Idaho, Mississippi, Oregon and South Dakota, the Constitutions, while giving the power of repeal or amendment by special laws, provide, substantially, that this power shall be exercised in such manner as to do no injustice to the corporators. In these States an immense amount of corporate capital has been invested on the faith of this guaranteed right. To the extent of the value of the corporate franchise it is as important as the provision of the Constitution, which guarantees them just compensation for property taken by the State. If the limitation as to the method of exercising this power of repeal is a mere direction to the legislature, unenforceable by the courts, the practical effect of the introduction of the limitation into the State Constitutions is destroyed, and in those States, as in the States where an unrestricted right of repeal is given, the legislature can, without let or hindrance, arbitrarily and unjustly impair or destroy legislative franchises. On the other hand, if the constitutional limitation can be enforced by the court, corporate franchises may still be altered or destroyed, but justice must be done to the corporators.

In considering this question, it is a fact of some importance that the people of Alabama deliberately inserted in their Constitution the present equitable restriction on the right of repeal after nine years' experience of a Constitution giving an unlimited right of repeal. Prior to 1868 the successive Constitutions of Alabama contained no reservation of a right to repeal charters. The Constitution

of 1868 first introduced that reservation in the following words:—

Article 13, section 1. Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes. All general laws and special Acts passed pursuant to this section may be altered, amended or repealed.

Evidently this unlimited power of repeal was found to be too broad and too discouraging to investors, as in 1875 a new Constitution was adopted (the one in force when the Bienville Water Supply Company was incorporated) and a clause was added restricting the right of repeal so that it should only be exercised "in such manner, however, "that no injustice shall be done to the corporators." The provisions of the 1875 Constitution in relation to amendment read:—

Article XIII., section 1. Corporations may be formed under general laws, but shall not be created by special Act, except for municipal, manufacturing, mining, immigration, industrial and educational purposes, or for constructing canals or improving navigable rivers and harbors of this State, and in cases where, in the judgment of the General Assembly, the objects of the corporation cannot be attained under general laws. All general laws and special Acts passed pursuant to this section may be altered, amended or repealed.

SECTION 10. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revokable at the ratification of this Constitution or any that may hereafter be created whenever, in their opinion, it may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew, or extend the charter of more than one corporation.

It will be observed that these provisions broadened the somewhat narrow policy of the previous Constitution, and offered more inducements to the investment of capital in corporations. Special charters might be granted for corporations whose work within the State would be of public benefit, and the right of repeal of such charters was limited by an equitable provision, which prevented destruc-

tion of franchises without compensation. It may be noted also that where in these provisions any subject was referred to the discretion of the legislature, it was so referred in express terms, as, for example, the provision that special Acts may be passed "in cases where, *in the judgment "of the General Assembly*, the objects of the corporation "cannot be attained under general laws," and the right of repeal "whenever, *in their opinion*, it may be injurious to "the citizens of the State." Had the framers of the Constitution intended to leave to the legislature the question whether the repeal was accomplished without injustice to the corporators they would have expressly so stated, and the restricting clause would have read, "in such manner, "however, as in the judgment of the General Assembly "will cause no injustice to the corporators." There was evidently no such intention on the part of the framers of the Constitution. They intended to limit by an equitable provision the previously existing unrestricted right of repeal, and to protect corporate franchises from confiscation as individual property was protected. This was deliberately done after nine years' experience under a Constitution containing no such safeguard.

No better case than the present one could be devised in which to raise the question, since here there was not even a pretense of doing justice to the corporators. In the Act of February 23d, 1899 (Record, page 21), the Act upon which the other two statutes of November 30th, 1898, and December 10th, 1898, depend for their efficacy, the charter of the Bienville Water Supply Company is amended by leaving out the exclusive privileges. No compensation is awarded, and no provision for compensation made. A right, the principal consideration for the expenditure of $850,000 and the assumption of important public duties, is taken away by a simple amendment leaving out the grant of the right.

The other statutes are equally devoid of any provisions for securing justice to the corporators. The Act of November 30th, 1898 (Record, page 43), gives the city of

Mobile the right to use the sources of supply, the exclusive right to which had been granted to the Bienville Water Supply Company, without compensation to or permission of the latter company.

The Act of December 10th, 1898 (Record, page 27), authorizing the city of Mobile to condemn the outstanding interests in the Stein works, does indeed inferentially provide for compensation, but only for interests in those works, and not for the destruction of the exclusive franchise of the Bienville Water Supply Company (including the right as assignee of the city to acquire and exclusively use the supply from Three-Mile Creek).

The case is one, therefore, in which justice in the sense in which it is understood and administered by courts has not been done or attempted by the legislature.

Can the courts inquire into this question?

The answer, it is submitted, ought not to be difficult. The phrase "that no injustice to be done to the corpo-"rators" is one of those general restrictions on legislative power so common to State Constitutions, and which from the necessities of the case cannot be framed in more specific language. This court, speaking by Mr. Justice Miller, in—

Davidson *vs.* New Orleans, 96 U. S., 97 (page 104), said:—

But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the case presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce and other powers conferred on the Federal Government, or limitations imposed upon the States.

It is manifest that some of the most important of the provisions for the protection of individual or corporate

rights against legislative encroachment must, of necessity, be framed in general and indefinite language, and that any attempt more accurately to express or define them would result in unduly limiting them. The framers of our Constitutions have wisely put in clear, but general and untechnical language, the most important of these provisions, and to-day the phrases "without due process of "law" and "without just compensation" are the expressions of two of the most important safeguards of private liberty and private property. To say, therefore, that a corporate charter shall only be amended in such manner that no injustice shall be done to the corporators, is simply to protect corporate franchises in the same way and by similarly indefinite language as private property is protected. In the one case, just compensation must be made, in the other no injustice shall be done.

This being so, will such a constitutional protection be inforced by the courts? That it was intended to be so inforced, is the strong inference from the fact that it was put in the Constitution, and reasoning by analogy to other similar general safeguards in the Constitutions and their inforcement by the courts, it would seem clear that the courts which interpret the law, not the legislature which makes it, is necessarily the judge whether there is a violation of the constitutional limitation. This court has always rejected the argument that the question of compliance with such general constitutional restrictions is a legislative question. Speaking by Mr. Justice Brewer in—

Monongahela Nav. Co. *vs.* U. S., 148 U. S., 312, it said (page 327):—

By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property through Congress or the legislature, its representative to say what compensation shall

be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In Charles River Bridge *vs.* Warren Bridge, 11 Pet., 420, 571, Mr. Justice McLean, in his opinion, referring to a provision for compensation found in the charter of the Warren Bridge, uses this language: "They (the legislature) provide that the "new company shall pay annually to the college, in behalf of "the old one, one hundred pounds. By this provision it ap- "pears that the legislature has undertaken to do what a jury "of the country only could constitutionally do: assess the "amount of compensation to which the complainants are en- "titled." See, also, the following authorities: Commonwealth *vs.* Pittsburgh & Connellsville Railroad, 58 Penn. St., 26, 50; Penn. Railroad *vs.* Balt. & Ohio Railroad, 60 Maryland, 263; Isom *vs.* Mississippi Central Railroad, 36 Mississippi, 300.

In the last of these cases, and on page 315, will be found these observations of the court: "The right of the legisla- "ture of the State, by law to apply the property of the citi- "zen to the public use, and then to constitute itself the judge "in its own case to determine what is the 'just compensation,' "it ought to pay therefor, or how much benefit it has con- "ferred upon the citizen by thus taking his property without "his consent, or to extinguish any part of such 'compensa- "'tion' by prospective conjectural advantage, or in any man- "ner to interfere with the just powers and province of courts "and juries in administering right and justice cannot for a "moment be admitted or tolerated under our Constitution. "If anything can be clear and undeniable upon principles of "natural justice or constitutional law, it seems that this must "be so."

And the court cites with approval the case of—

Commonwealth *vs.* Pitts. & Con. R. R., 58 Pa., 26, in which it was held that the reservation of a power to repeal a charter upon the misuse or abuse of corporate privileges, did not constitute the legislature the sole judge of such misuse or abuse, the court (Sharswood, J., delivering the opinion) saying (page 46):—

If this were a contract between man and man, it could not be pretended that when one party reserves the power to rescind in a certain event, he is thereby constituted the judge of whether the event has occurred. It is a condition precedent

to the exercise of the power, and the party claiming it must prove affirmatively the existence of the fact. What difference does it make that the State is one of the parties? She has entered into this contract through the legislature, and in the decision of all questions of fact which may arise upon it the judiciary department must be invoked as in other cases.

The suggeston in this last citation is very pertinent. Suppose, in the present case, the clause in the State Constitution instead of being found there had been part of the charter, and the legislature in granting the franchise had stipulated that it might be revoked in such manner as to do no injustice to the corporators, would the legislature in such case have been the sole judge as to the injustice?

As to the question of laches.

But little need be said upon this point. This defense must necessarily be founded on delay and not on estoppel, since nowhere in the testimony is there any declaration by any person that he did or omitted any act under the belief that the Bienville Water Supply Company did not intend to assert its rights or because he was misled by any act or omission of that company. From the very nature of the case it was apparent to the city of Mobile, and to every person interested, that the Bienville Water Supply Company would contest most vigorously and to the bitter end this attack upon its franchises. Indeed, its duty, not only to its own stockholders, but to the capitalists who had taken its bonds in reliance upon its charter, compelled it to do this. It would be absurd from the circumstances of the case to suppose that anyone did any act in the belief that the Bienville Water Supply Company would acquiesce in the destruction of its most important franchises.

WAS THERE ANY DELAY WHICH PRECLUDED THE BIENVILLE WATER SUPPLY COMPANY FROM ASSERTING ITS RIGHTS?

The fact is that none of the Acts performed by the city of Mobile could have affected the rights of the Bienville Water Supply Company under its contract with the State, unless the State, through its legislature, attempted to break the contract. It was not therefore, until the statutes were passed which are set up in the defendant's answer, that the necessity for filing the present bill arose. These statutes were four in number. Two of them passed on November 30th, 1898, giving to the city the power to borrow money and to condemn property; one of them passed on December 10th, 1898, giving to the city the right to condemn the outstanding interest in the Stein Works, and the last one, passed February 23d, 1899, amending the charter of the Bienville Water Supply Company and taking away its exclusive rights. The breach, by the State, of the contract was not complete without this last Act; its passage was necessary to remove the obstruction of the contract which stood in the way of the city's competition.

The bill in the present case was filed one day before the approval of this last Act, and presumably therefore either after or just at the time of its final passage by the legislature. The city had not commenced the erection of its new works, but had simply made surveys. Its contractors had, at some time between December 1st, 1898, and February 22d, 1899, laid considerable pipe in the streets of Mobile, but neither contractor nor city official has testified that this was done under any belief that the water company would not file its bill if the final Act amending its charter was passed.

Where, then, was the delay in this case which should turn the complainant out of court and prevent the court from giving it the justice to which it is entitled? The bill was filed the day before the approval of the final statute, and immediately thereafter the answer of the defendant was filed setting up that final statute as a defense to the bill. (Record, page 21.)

Instead of presenting a case of extraordinary delay, the case seemed to have been one of diligence.

To recapitulate, it is submitted:—

First.—That the Bienville Water Supply Company had a valid charter giving to it certain valuable franchises in return for the expenditure of money and the assumption of public duties.

Second.—That the Bienville Water Supply Company spent the money, and assumed and is performing the duties.

Third.—That the legislature altered the franchises by taking away one of its most valuable features, without any pretense of making compensation or doing justice to the corporators, and that the city of Mobile, under authority of this legislation, is about to enter into a competition based upon this legislative injury to the corporate franchise of the Bienville Water Supply Company.

Fourth.—That it is within the power of the court to protect the Bienville Water Supply Company against this violation of its contract, and to enforce in its favor a constitutional limitation upon the legislature's power of amendment.

Fifth.—That there has been no laches which would preclude plaintiff's right to relief.

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No. 374. 126
Brief of Boone v. Russell

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In the Supreme Court of the United States

OCTOBER TERM, 1900.

No. 374.

BIENVILLE WATER SUPPLY COMPANY,
Appellant,

VS.

THE CITY OF MOBILE, et al., Appellees.

BRIEF OF THE APPELLEES ON THEIR MOTION TO DISMISS OR AFFIRM.

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Counsel for Appellees.

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STATEMENT OF THE CASE.

The bill in equity in this case was filed in the Circuit Court of the United States, Fifth Judicial Circuit, Southern District of Alabama, on February 21st, 1899, and sought to enjoin the City of Mobile until July 1st, 1908, from erecting, constructing or operating a system of water works connected with or having its source of supply of water from Three Mile Creek or any other stream of water in Mobile County, Alabama, other than Three Mile Creek.

At the time the bill was filed the water works system of the City of Mobile was being actively constructed under express authority to that end from the General Assembly of Alabama. The bill also sought to enjoin the City of Mobile from operating what is known as the Stein system of water works which it had acquired. An injunction was prayed upon the ground that such action on the part of the City of Mobile would impair the exclusive right of the appellant of supplying water to the City of Mobile and its inhabitants, secured to it by the act of the General Assembly of Alabama incorporating appellant, approved February 19th, 1883, (Record, pages 66-71)

and which said act was amended by an act of the General Assembly of Alabama, approved February 14th, 1885, set out in the bill and also put in as part of the evidence in the cause, (Record, pages 2 and 72) in violation of Article 1, Section 10 of the Constitution of the United States. The appellees filed a sworn answer to the bill on February 27th, 1899, and in their answer, claimed that the Bienville Water Supply Company under its charter from the State of Alabama, did not have an exclusive privilege of supplying the City of Mobile and its inhabitants with water until July 1st, 1908, as alleged in its bill, because:

1st. Under the charter of the Bienville Water Supply Company (Acts of Alabama, 1884-5, pages 489-91) as set out in the first paragraph of the bill, reading: "*But "nothing in this act shall be construed to prohibit the or- "ganization hereafter of any company for the purpose of "supplying the City of Mobile or any other place with "water which does not interfere with the property rights "or rights of obtaining water pertaining to this com- "pany,*" (Record, pages 2 and 72), it is clear the General Assembly did not grant said Water Supply Company an exclusive privilege of supplying water to the City of Mobile, and its inhabitants.

2nd. That if said last named act conferred such exclusive privilege upon the appellant, it had been amended and such exclusive privilege taken away by the General Assembly of Alabama by an act amending said act of February 14th, 1885, approved February 23rd, 1899, Local Acts of Alabama, 1898-9, page 1689. (Record, page 21.)

3rd. That any alleged exclusive privilege so to supply water was repealed by an act of the General Assembly of Alabama, entitled "An act to authorize the City of Mobile to provide, maintain and operate systems of water works and sewerage," approved November 30th, 1898. Local Acts of Alabama 1898-9, page 19. (Record, page 43.)

Appellees claim that said repeal was effective under Article XIV, Section 1, of the Constitution of Alabama, which is as follows:

"Corporations may be formed under general laws, "but shall not be created by special act, except for muni-

"cipal, manufacturing, mining, immigration, industrial, "and educational purposes, or for constructing canals, "or improving navigable rivers and harbors of this State, "and in cases where, in the judgment of the General "Assembly, the objects of the corporation cannot be "attained under general laws. All general laws and "special acts passed pursuant to this section may be "altered, amended or repealed."

4th. Appellees claim that the Constitution of Alabama, of A. D., 1875, in Article I, Section 23, and in Article XIV, Section 2, forbade the General Assembly of Alabama from granting an exclusive privilege to supply water to the City of Mobile and its inhabitants.

These provisions of the Constitution of Alabama read as follows:

Article I, Section 23, "That no ex post facto law, or any law impairing the obligation of contracts, or making any irrevocable grants of special privileges or immunities, shall be passed by the General Assembly."

Article XIV, Section 2, "All existing charters or "grants of special or exclusive privileges, under which "a bona fide organization shall not have taken place "and business been commenced in good faith, at the "time of the ratification of this constitution, shall there-"after have no validity."

The last mentioned sections of the constitution are also set out in the decision of the Supreme Court of Alabama in the Birmingham Street Railway cases, quoted and found at page 3 of this brief.

The appellees insisted in their answer that when the General Assembly of Alabama passed the laws authorizing the City of Mobile to construct and operate water works, and the act of February 23rd, 1899, amending the charter of appellant and affecting the repeal of any alleged exclusive privileges theretofore possessed by it, whether the General Assembly acted under Article I, section 23, or under Article XIV, section 1, or under Article XIV, section 10 of the Constitution of Alabama, all questions of expediency, and respecting the just operation of said laws under the power vested in the General Assembly by the constitution, were settled when

said laws were enacted. That all questions respecting the repeal of the alleged exclusive privilege were necessarily questions "of legislative discretion, and, on questions such as this, not one of judicial determination."

The appellees showed in their answer that the City of Mobile was specially authorized by the General Assembly by the act approved December 10th, 1898, entitled "An act to authorize the City of Mobile for the purpose of aiding in the erection of its municipal water works, to condemn by eminent domain the outstanding interest in what is known as the Mobile City Water Works," to condemn by eminent domain all interest of every kind, character or description not owned by the City of Mobile in the Stein or Mobile City Water Works, for the purpose of aiding in the construction of the new system of water works of said city. (Record, page 27.)

The City of Mobile has a contract right, not subject to repeal or impairment, to secure water from Three Mile Creek for its water works, under a contract with one Albert Stein executed on December 26th, A.D. 1840, ratified and confirmed by an act of the General Assembly of Alabama, entitled "An act for the promotion of the health and convenience of the City of Mobile, by the introduction of a supply of wholesome water into said city, to be used for domestic purposes and the extinguishment of fires," approved January 7th, 1841. (Record, page 173.)

The testimony introduced in evidence showed without conflict that the City of Mobile intended to take water from Three Mile Creek for its new system of water works. (Record, pages 145, 160, 164.)

The evidence in the cause also showed that Eight Mile Creek was not the same creek as Clear Creek, the source of water supply of the appellant. (Record, pages 128, 131, 136, 144, 149.)

The cause was argued and submitted to the Circuit Court for decision upon the bill, answer and proof. The court rendered a decision on June 4th, 1900, dismissing the bill of appellant out of that court at its costs. (Record page 178.) All the acts of the General Assembly of Alabama to which reference is made, are set out in full in the record at the pages indicated herein.

ARGUMENT.

The complainant seeks to enjoin the City of Mobile from operating the Stein or Mobile City Water Works, and from constructing a system of water works to connect with Three Mile Creek or any other creek or stream in Mobile county. In the prayer of the bill and in other parts thereof, it is claimed that the appellant has an exclusive privilege of supplying the City of Mobile and its inhabitants with water. (Record, page 16.) Again, in paragraph ten (10) of the bill, (Record, page 9,) it is stated that its exclusive privilege is not a monopoly, although it is insisted that the City of Mobile has no right to erect or operate a system of water works, connected with any stream in Mobile county. We understand that an exclusive privilege is one which excludes others from exercising the same privilege. That whether a privilege is exclusive or not depends upon the fact of the exclusion of others from such right or privilege and not upon the length of time that others are debarred from exercising the right or privilege. The Supreme Court of Alabama, after quoting Article I, Section 23 and Article XIV, Section 2 of the Constitution of Alabama, through Mr. Justice Somerville in the case of the Birmingham and Pratt Mines Street Railway Company vs. Birmingham Street Railway Company, 79 Alabama, at page 473, said:

"These provisions occur for the first time in the Con-"stitution of 1875, and have not heretofore been the sub-"ject of construction by this court.

"What, it may be asked, is the nature of these special "or exclusive privileges, which are thus prohibited "to be granted by the legislature? It seems plain from "the terms used, that the evil intended to "be specially "prevented was the granting of exclusiveprivileges in the "nature of a monopoly by the legislative creation of corpo-"rate franchises. Monopolies were void at the common "law and not commonly confered by legislative grant, "and need no special inhibition in the organic law of a free "republic. They may now be regarded as relics of "governmental folly, rendered odious by royal preroga-"tive in the most extravagant periods of the European

"monarchies. In the strict sense, a monopoly is an ex-
"clusive right granted to one person, or a class of per-
"sons, of something which was before of common right.
"A franchise is a special privilege conferred by the State
"or government upon individuals, and which does not
"belong to citizens of the country by common right. It
"has been a common legislative practice to make grants
"of this kind, and they have led to much protracted liti-
"gation in all of the American courts. Examples of this
"kind are found in numerous cases where the exclusive
"privilege has been conferred on favored individuals
"and corporations, to manufacture and sell gas in a city;
"or to supply the inhabitants with water; or to construct
"a bridge, or run a ferry across a river between two
"given points, free from competition within certain
"limits; or to construct a canal, turnpike, or railroad be-
"tween certain designated termini; or to construct and
"rent a market house in a city; or to own and control
"the only premises which can be lawfully used for the
"slaughter of live stock within municipal limits; or in
"fine, as has been done many times in this and other
"States, to confer on favored corporations an irrevocable
"exemption from the common burdens of equal taxation,
"either by exacting from them an inconsiderable *bonus*
"in commutation of all future taxation, or else exacting
"from them no taxes at all. The following cases illus-
"trate monoplies of this kind, so often conferred by leg-
"islative franchises: New Orleans Gas Light Company
"vs. Louisiana Light Co., 115 U. S., 650; New Orleans
"Water Works Co. vs. Rivers, 115 U. S., 674; The Bing-
"hamton Bridge, 3 Wallace, 51; City of Chicago vs. Rumpf
"45 Illinois, 90; Slaughter House Cases, 16 Wallace, 36;
"Gale vs. Kalamazoo, 23 Mich., 344; S. C., 9 American
"Rep., 80; Atlantic City Water Works vs. Atlantic City,
"39 N. J. Eq.; S. C., 10 Amer. & Eng. Corp. Cases, 59;
"Norwich Gas Light Co. vs. Norwich City Gas Co., 25
"Conn., 19; Mobile R. R. Co. vs. Kennerly, 74 Ala., 566;
"Daughdrill vs. Alabama Life Ins. Co., 31 Ala., 91; Home
"of the Friendless vs. Rouse, 8 Wallace, 430. The very
"fact that the legislature could, according to the better
"view, make irrevocable grants of this nature, was the
"very reason, no doubt, why the organic law was made

"so as to prohibit such grants in the future. In the "struggling infancy of the States and communities, the "temptation has been very great to offer them, as a re- "ward to the investment of capital. The injustice and "inequality of their operation have only been illustrated "in the light of the rapid increase of our population, the "steady growth of our wealth and the wonderful discov- "eries of modern science. It now more fully becomes "manifest that they prove iron bands to fetter the growth "of public industry, enterprise and commerce. Free "competition in all departments of commercial traffic is "justly deemed to be the life of a people's prosperity. "The policy of the law, as now declared by our constitu- "tion, is as clear in the condemnation of the grant of irre- "vocable exclusive privileges conferred by franchise, as "that of the common law was in the reprobation of pure "monopolies which were always deemed odious, not only "as being in contravention of common right, but as "founded in the destruction of trade by the extinguish- "ment of a free and healthy competition. The case of "the Monopolies, 11 Rep., 84.

"*The exclusive right of the appellee to the privilege "claimed, in our opinion, cannot be sustained. The Gen- "eral Assembly would itself have no power under the "constitution to make such a grant*"

This court has steadfastly adhered to the principle that it would follow the construction put upon the constitution of a state by its highest court.

Polk vs. Wendell, 9 Cranch, at middle of page 98.

Merchants and Manufacturers Bank vs. Pennsylvania, 167 U. S., at page 462.

Fall Brook Irrigating District vs. Bradley, 164 U. S., bottom of page 154.

Wilson vs. State of North Carolina, ex rel Caldwell, 169 U. S., bottom of page 592;

Brown vs. New Jersey, 175 U. S., page 174;

Erb as Receiver vs. Morasch, 177 U. S., 584.

The charter of the appellant was granted by the General Assembly of Alabama more than seven years after the ratification and adoption of the present Constitution of Alabama. Under the decision of the Supreme

Court of Alabama quoted above at length, it seems clear that no exclusive privilege of supplying water could pass to appellant by virtue of its charter and the amendment of February 14th, 1885, set out int he bill, because the General Assembly had no power to grant an exclusive right or privilege. It is to be specially noted that section 11 of the original charter of the appellant conferred upon it in clear and express language an exclusive privilege to supply water to the city of Mobile and its inhabitants as soon as it obtained the right to bring water from Three Mile creek, (Record, page 69.) Why was it when the charter of the company was amended on its initiative, February 14th, 1885, (Record, pages 2 and 72) section 11 of the charter of appellant was made to read: "But nothing in this act shall be construed, &c." Was not section 11 of the charter so amended to make it conform to the Constitution of Alabama?

II

We contend that an exclusive privilege will not be held by the courts to have been granted unless it is done in clear and unequivocal language. As shown in the bill of complainant (Record page 2), the section of its charter in which it is claimed that an exclusive privilege was conferred, contains the following: "*But nothing in this Act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the City of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company.*" This language we submit negatives the idea that it was the intention of the General Assembly to confer upon the appellant the exclusive privilege of supplying water to the City of Mobile and its inhabitants. We contend that the principle is firmly established in the jurisprudence of our country that an exclusive privilege can only be created when the language used is such as to leave no reasonable doubt. The principle is stated with unusual force by Mr. Chief Justice Marshall in United States vs. Fisher, 2 Cranch, 390. "When rights are infringed, where fundamental principles "are overthrown, where the general system of the laws is

"departed from the legislative intention must be expressed "with irresistible clearness to induce a court of justice to "suppose a design to effect such object."

In the Binghampton Bridge case, 3 Wallace, 51, Mr. Justice Davis, for this court, said: "The principle is "this, that all rights which are asserted against the "State must be clearly defined, and not raised by infer- "ence or presumption; and if the charter is silent about "a power, it does not exist. If, on a fair reading of the "instrument, reasonable doubts arise as to the proper "interpretation to be given to it, those doubts are to be "solved in favor of the State; and where it is susceptible "of two meanings, the one restricting and the other ex- "tending the powers of the corporation, that construc- "tion is to be adopted which works the least harm to the "State." This language is quoted and approved by this court, through Mr. Justice Harlan in Stein vs. Bienville Water Supply Company, 141 U. S., 67.

In Pennsylvania Railroad Company vs. Canal Commissioners, 21 Pa., St. Reports, 22, the principle is thus stated by the Supreme Court of Pennsylvania:

"When a State means to clothe a corporate body "with a portion of her own sovereignty and to disarm "herself to that extent of the power that belongs to her, "it is so easy to say so that we will never believe it to be "meant when it is not said. In the construction of a "charter to be in doubt, is to be resolved, and every res- "olution which springs from doubt, is against the cor- "poration."

III.

If it should be held that the amended charter of the Bienville Water Supply Company as the same appears in the Acts of Alabama, 1884-5, pages 489-91, (Record, pages 72-73,) contains the grant of an exclusive privilege to the Bienville Water Supply Company of supplying the City of Mobile and its inhabitants with water, then we submit that it was repealed by the act of the General Assembly of Alabama, entitled "An act to amend an act entitled "An act to amend sections one, five and eleven of an act to incorporate the Bienville Water Supply Company, ap-

proved February 19th, 1883," Approved February 23rd, 1899. Local Acts of Alabama 1898-9 page 1689 (Record page 21.), and that any such exclusive privilege was also repealed by an act of the General Assembly of Alabama, entitled, "An act to authorize the City of Mobile to provide, maintain and operate systems of water works and sewerage." Approved November 30th, 1898, Local Acts of Alabama 1898-9 page 19. (Record, page 43.). In the case of Bibb vs. Hall & Farley, 101 Alabama, bottom of page 98 the Supreme Court of Alabama, said:

"Generally speaking, the rights of a corporation are "determined by the law in force when it came into being, "though it cannot be denied that by the laws of this "state, the charter of either of these companies was sub- "ject to amendment or repeal by future legislation. Art- "icle XIV, Section 10 Const. of Ala.; Chesapeake and "Ohio R. R. Co. vs. Miller, 114 U. S. 189."

In the case of the Hamilton Gas Light and Coke Co. vs. City of Hamilton 146 U.S. 258, this court through Mr. Justice Harlan said: "*Accepting, as we do, this decision of the "highest court of the state as correctly interpreting the "legislative will*, and, therefore assuming that the legis- "lature intended by Section 2486 to confer authority upon "the City of Hamilton to erect gas-works at its expense, "whenever deemed by it expedient or for the public good "to do so, the next contention of the plaintiff is that such "legislation is within the constitutional inhibition of "state laws impairing the obligation of contracts. This "view is inadmissible. The statutes in force when the "plaintiff became a corporation did not compel the city "to use the gaslight furnished by the plaintiff. The city "was empowered to contract with the company, for light- "ing streets, lands, squares, and public places with- "in its limits, but it was under no legal obliga- "tion to make a contract of that character, although "it could regulate, by ordinance, the price to be "charged for gas light supplied by the plaintiff "and used by the city or its inhabitants. It may be "that the stockholders of the plaintiff supposed, at the "time it became incorporated, and when they made their "original investment, that the city would never do what

"evidently is contemplated by the ordinance of 1889. "And that it may be that the erection and maintenance "of gas works by the city at the public expense and in "competition with the plaintiff, will ultimately impair, "if not destroy, the value of the plaintiff's works for the "purposes for which they were established. But such "considerations cannot control the determination of the "legal rights of the parties. * * * * * * * * * * "If the statute under which the plaintiff became incor- "porated be construed as giving it the exclusive privi- "lege, so long as it met the requirements of law, of sup- "plying gas light to the City of Hamilton and its inhabi- "tants by means of pipes laid in the public ways, there "is no escape from the conclusion that such a grant, as "respects, at least, its exclusive character, was subject "to the power of the legislature, reserved by the State "constitution, of altering or revoking it. This reserva- "tion of power to alter or revoke a grant of special priv- "ileges necessarily became a part of the charter of every "corporation formed under the general statute providing "for the formation of corporations. A legislative grant "to a corporation of special privileges, *if not forbidden "by the constitution*, may be a contract, but where one of "the conditions of the grant is that the legislature may "alter or revoke it, a law altering or revoking, or which "has the effect to alter or revoke, the exclusive charac- "ter of such privileges, cannot be regarded as one im- "pairing the obligation of the contract, whatever may "be the motive of the legislature, or however harshly "such legislation may operate, in the particular case, "upon the corporation or parties. The corporation, by "accepting the grant subject to the legislative power so "reserved by the constitution, must be held to have as- "sented to such reservation."

IV.

We insist that when the General Assembly of Alabama enacted the laws authorizing the City of Mobile to construct and operate water works, and the act of February 23rd, 1899, amending the charter of the Bienville Water Supply Company, repealing any alleged exclusive

privilege of that company, that whether the General Assembly acted under Article I, Section 23; Article XIV, Section 10, or Article XIV, Section 1 of the Constitution of Alabama, all questions affecting the expediency and just operation of said laws, under the power vested in the General Assembly by the constitution, were settled when said laws were passed. We contend that all questions in reference to the injury suffered by the appellant upon the repeal of the alleged exclusive privilege, and the just operation of the act were necessarily matters "of legislative discretion, and on questions such as this, not one of judicial determination." It is perfectly clear that the courts cannot interfere with matters of legislative discretion. Fox vs. McDonald, 101 Alabama, at the middle of page 65; Clarke vs. Jack, 60 Alabama, 278; Mageun vs. Illinois Trust and Savings Bank, 170 U. S., bottom of page 298.

In Spring Valley Water Works vs. Schottler, 110 U. S., 374, near the close of the opinion Mr. Chief Justice Waite said: "The power to amend corporate charters is no doubt one that bad men may abuse, but when the amendments are within the scope of the power, the courts cannot interfere with the discretion of the legislatures that have been invested with the authority to make them." See also License Tax Case, 5 Wallace, 469; Perry vs. Keene, 56 N. H., 514.

In Attorney General vs. Chicago, etc. R. R. Co., 35 Wisconsin, page 576, Chief Justice Ryan says: "It seems to us that the legislature is the sole judge of the reasonable nature of the alteration, as it is the sole judge of the reasonable nature of the original charter." Cooley's Const. Limitations, 5th Edition, pages 52, 200, 201 and 263, and authorities cited.

In the case of the United States vs. Arredondo, 6 Peters, at the bottom of page 729, Mr. Justice Baldwin for this court said: "It is a universal principle that, "where power or jurisdiction is delegated to any public "officer or tribunal over a subject matter, and its exercise "confided to his or their discretion, the acts so done are "binding and valid as to the subject matter, and individual rights will not be disturbed collaterally for anything done

in the exercise of that discretion within the authority and power conferred. The only question that can arise between an individual claiming a right under the acts done, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive judicial or legislative, unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal prescribed by law." See 3rd American and Eng. Ency of Law, 1st Edition, page 684.

V.

The Act of the General Assembly of Alabama, entitled, "An act for the promotion of the health and convenience of the City of Mobile by the introduction of a supply of wholesome water into said city, to be used for domestic purposes and the extinguishment of fires." Approved January 7th, 1841, (Record, page 173,) confirmed the contract made between Albert Stein and the City of Mobile of December 26th, 1840, whereby said city secured the right to acquire the Stein or Mobile City Water Works after twenty years from said date, "or any further time," (Stein vs. Bienville Water Supply Co., 141 U. S., 67,) and to take water from Three Mile Creek. The City of Mobile secured in the manner provided for in the contract of December 26th, 1840, by arbitration, 45.72 per cent. of the property and interests in the Stein water works, (Record, pages 61 and 83,) and anticipating that it might fail under the arbitration proceedings to secure the remaining 54.28 per cent in said water-works system owned by Mr. Walter Wood, the Treasurer of the Bienville Water Supply Company (Record, page 105.), it secured before Cause No. 208 set out in the record from pages 73 to 98, was submitted for decision or decided in the Circuit Court of the United States at Mobile, the passage by the General Assembly of Alabama of the act entitled, "An Act to authorize the City of Mobile for the purpose "of aiding in the erection of its municipal water works, "to condemn by eminent domain the outstanding in-"terest in what is known as the Mobile City Water "Works." Approved December 10th, 1898. Local Acts of

Alabama, 1898-9, page 139. (Record, page 27.) The City of Mobile filed the necessary application to condemn the outstanding interests of the Stein or Mobile City Water Works, in the Probate Court of Mobile county, two days after the decision in the arbitration suit between the City of Mobile and Walter Wood was decided, and eight days before the bill in this cause was filed, (Record, pages 61-64) and has condemned said interest, as shown by the decision of the Supreme Court of Alabama in the case of the State of Alabama, ex rel Walter Wood vs. Price Williams, Jr., Judge of Probate, 28 Southern Reporter, page 401.

That the General Assembly of Alabama had the power to authorize the City of Mobile to obtain the outstandlng interest not owned by it, in the Stein Water Works. See New Orleans Gaslight Company vs. Louisiana Light, etc. Mfg. Company, 115 U. S., page 673; Shoemaker vs. United States, 147 U. S., at page 298; Railroad Company vs. B. S. and Tenn. River R. R. Co., 96 Alabama, 576; Railroad Company vs. Railroad Company, 82 Alabama, bottom of page 299; Cooley's Constitutional Limitations, 5th Edition, page 558; Steele vs. County Commissioners, 83 Alabama, 304; 10th American and English Ency. of Law, 2nd Edition, page 1091.

As we have heretofore said, the right to acquire the Stein Water Works was conferred upon the City of Mobile by a certain contract, based upon valuable considerations, entered into by and between Albert Stein and said city, dated December 26th, 1840, ratified by the act of the General Assembly of Alabama of January 7th, 1841, and passed upon by this court in Stein vs. Bienville Water Supply Company, 141 U. S., 67. The contract was made and ratified by the Legislature of Alabama thirty-four years before the ratification and adoption of the present Constitution of Alabama of 1875, and vested a right of property in the City of Mobile to acquire and operate the Stein system of water works and this contract right cannot be divested out of the city by any change in the organic law of the State, even if Article 1, Section 37 and Article 4, Sections 50, 54 and 55 of the present constitution have, which we deny, the

effect claimed by appellant's counsel. See New Orleans Gas-light Company vs. Louisiana Light etc Mfg. Co. 115 U. S. 672; Town of Pawlett vs. Clark, 9 Cranch 292; Grogan vs. San Francisco, opinion by Chief Justice Field, 18 California 590-612; Mount Hope Cemetery Company vs. City of Boston 158 Mass. 509, same case 35 American State Reports 515, with an elaborate note by Mr. A. C. Freeman. This same contention which is put forward in the amended bill (Record, page 65) that under the present constitution of Alabama, the City of Mobile had and has no power to operate water-works, was pressed upon this court by the present counsel for appellant, at the bottom of page four of their brief in Bienville Water Supply Company vs. Mobile, 175 U. S., 109.

VI.

In the answer of the defendants they have insisted that the appellant was not entitled to an injunction upon the ground that it stood by and let the work of securing city ownership of water works begun in July, 1897, proceed without let or hindrance until the bonds had been issued, contracts made and being rapidly executed before it sought the protection of the courts. The defendants adopted in their answer the language of Mr. Justice White in the Penn. Mutual Life Ins. Co. vs. Austin, 168 U. S., at page 701. (Record, page 34.) We think the laches of the appellant comes clearly within the rule as stated in the case last cited.

In conclusion, we submit that if our contention and the conclusion of the Circuit Court is correct, that the Bienville Water Supply Company did not have an exclusive privilege of supplying the City of Mobile and its inhabitants with water until July 1st, 1908, then there was and is no federal question in this cause. If appellant had no exclusive privilege then there could be no impairment of the contract in violation of the Constitution of the United States under the case made by the bill. The appellant and the appellees are citizens of the State of Alabama; the federal question depended upon the averment in the bill that the exclusive privilege granted to the appellant by the State of Alabama was being violated in

defiance of the Constitution of the United States. What was said by this court through Mr. Justice Peckham in McCain vs. DesMoines, 174 U. S., at page 181, we think appropriate to the case at bar: "Such being the law of Iowa, " we are of the opinion that an allegation in the bill that " this is a controversy and a suit of a civil nature arising " under the Constitution and laws of the United States is " not supported by the facts appearing in the bill. The " facts alleged must show the nature of the suit, and it " must plainly appear that it arises under the Constitution " or laws of the United States; that is, there must be a real " and substantial dispute as to the effect or construction of " the constitution or some law of the United States, upon " the determination of which the controversy depends. * " * * * The allegation that the suit arises under the Con- " stitution of the United States is so palpably unfounded " that it constitutes not even color for the jurisdiction of " the Circuit Court."

We respectfully urge that there is color for the motion to dismiss, and that the motion to affirm should be sustained.

Wilson vs. North Carolina, ex rel Caldwell. 169 U. S., middle of page 595.

Bienville Water Supply Company vs. Mobile, 175 U. S., 109.

City of Chanute vs. Trader, 132 U. S., 210.

Craemer vs. State of Washington, 168 U. S., at page 131.

All of which is respectfully submitted.

B. B. BOONE,
E. L. RUSSELL,
Counsel for Appellees.

No. 374 October Term, 1900.

Supreme Court of the United States.

THE BIENVILLE WATER SUPPLY COMPANY,
Appellant,

vs.

THE CITY OF MOBILE AND JOHN CURTIS BUSH,
Mayor thereof, Appellees.

ADDITIONAL BRIEF FOR THE APPELLEES IN REPLY TO BRIEFS OF APPELLANT UPON THE MOTIONS OF THE APPELLEES TO DISMISS OR AFFIRM.

B. B. BOONE,
E. L. RUSSELL,
Counsel for Apellees.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 374.

THE BIENVILLE WATER SUPPLY COMPANY,
Appellant,

vs.

THE CITY OF MOBILE AND JOHN CURTIS BUSH,
Mayor thereof.

BRIEF OF THE APPELLEES IN REPLY TO THE BRIEFS OF THE APPELLANT.

We respectfully urge that no one can read the Constitution of Alabama of 1875, and not be impressed with the fact that it was the manifest intention of the framers of that instrument when they adopted Article I, Section 23, known as the declaration of rights, and Article XIV, Sections 1 and 2, to retain and secure to the people of Alabama, full power and control over corporate franchises, which might be granted; a power and authority which the State would be deprived of without such reservation, by the federal constitution, as that instrument has been interpreted by this court in the Dartmouth College and subsequent cases, and followed by the Supreme Court of Alabama in many of its decisions. The charter of the appellant was created under Article XIV, Section 1, being a case where in the judgment of the General Assembly the objects of the corporation could not be attained under general laws. Said section of the Constitution provides that "all general laws and special acts passed pursuant to 'THIS SECTION' may be altered, amended or repealed." The franchise of the appellant being created by the General Assembly under the power conferred in Article XIV, Section 1, it seems to us to be

free from doubt that when the General Assembly altered, amended or repealed the law it had passed under that section of the constitution, that the judgment of the General Assembly cannot be enquired into or controlled by the courts, any more than they could enquire into and control the judgment of the General Assembly in passing the original law creating the appellant. And so we believe it was the intention of the framers of the Constitution of Alabama, in Article XIV, Section 10, to provide against any injury to the material, physical property and rights of corporations, "but that the franchises of corpo-"rations, as comports with the dignity and safety of the "State should be subject to the power which grants them, "that corporations should exist as the subordinates of "the State, which is their creator." The Attorney General vs. Railroad Companies, 35 Wisconsin, page 574.

II.

What did the General Assembly of Alabama mean when it used the language in Section eleven of the charter of the appellant? (Record, pages 2 and 73): "*But "nothing in this act shall be construed to prohibit the or-"ganization hereafter of any company for the purpose "of supplying the City of Mobile or any other place with "water which does not interfere with the property rights "or rights of obtaining water pertaining to this com-"pany?*" No other company could be organized for supplying water to the City of Mobile without affecting the franchise of the appellant, and hence it must have been the intention of the legislature to guard the appellant against any interference with its material, physical property, its pumps, machinery, pipes, etc., by the words "property rights;" and that the words were used in their popular sense. In Spencer vs. State, 5 Indiana, 41, it is said: "In statutory exposition, the reason, the spirit of "the law, is above the mere cavil about words." In People vs. Lacombe, 99 New York, 43, it is said: "It is "the spirit and purpose of a statute which are to be re-"garded in its interpretation; and if these find fair ex-"pression in the statute, it should be so construed as to "carry out the legislative intent, even although such

"construction is contrary to the literal meaning of some "provisions of the statute." In Commonwealth vs. Kimball, 24 Pickering, 370, Chief Justice Shaw said: "It "is unquestionably a well settled rule of construction "applicable as well to penal statutes as others, that when "the words are not precise and clear, such construction "will be adopted as shall appear most reasonable and "best suited to accomplish the objects of the statute."

This court has decided "that every public grant of "property, or of franchises, if ambiguous, is to be *con-"strued against the grantee* and in favor of the public."

Central Transp. Co. vs. Pullman Palace Car Co., 139 U. S., 24.

Oregon River & Navigation Co. vs. Oregonian R. R. Co., 130 U. S., 1.

In the Central Transportation Company vs. Pullman's Palace Car Co. case, in which the present counsel for the appellant in this case. Mr. John G. Johnson, was counsel for the appellant in that case, Mr. Justice Gray for this court said:

"By a familiar rule, every public grant of property, "or of privileges or franchises, if ambiguous, is to be "construed against the grantee and in favor of the pub-"lic; because an intention on the part of the government "to grant to private persons, or to a particular corpora-"tion, property or rights in which the whole public is in-"terested, cannot be presumed, UNLESS UNEQUIVOCALLY "EXPRESSED OR NECESSARILY TO BE IMPLIED in the terms "of the grant; and because the grant is supposed to "be at the solicitation of the grantee, and this rule of con-"struction is a wholesome safeguard of the interests of "the public against any attempt of the grantee, by the "insertion of ambiguous language, to take what could "not be obtained in clear and express terms." Again, this court has decided that in every statute granting a privilege, it is to be construed most strongly against the grantee.

Hannibal & St. J. R. R. Co. vs. Missouri River Packet Co., 125 U. S., 260.

In Section 11 of the amended charter of appellant, (Record, pages 2 and 73) the legislature put, in the words

we have quoted above, an interpretation upon the privilege granted, and when that section is compared with the same section in the original charter (Record, bottom of page 69) it will be found radically different. A statute may contain an interpretation clause.

Farmer's Bank vs. Hale, 59 New York, 57.
United States vs. Gilmore, 8 Wallace, 330.

In the search for the intent of the framers of the constitution or an Act of the General Assembly it is familiar law that the court will look to each and every part thereof, to the old law upon the subject, and to the evils and mischiefs intended to be remedied.

III.

The original charter of the Bienville Water Supply Company in Section 11, (Record, page 69,) and the same as amended by the act of February 14th, 1885, (Record, page 72,) provided that the appellant should enjoy the right of "bringing water from any point other than "Three Mile Creek, in the county of Mobile, for the sup- "ply of said port of Mobile and village of Whistler, for "the period of twenty years from the time when said "water shall have been brought within the limits of the "Port of Mobile, and be ready for distribution, and sup- "ply to the inhabitants of the Port of Mobile, AND THE "HOUSES AND DWELLINGS WITHIN THE LIMITS OF SAID "PORT."

The sworn answer of the appellees charges that this requirement of the charter of appellant had never been complied with, (Record, Page 22,) "because defendants "say that it has never up to the date of filing this answer "had the water ready for distribution and supply, ex- "cept to a portion of the inhabitants of said city. Fur- "ther answering defendants say that upon many of the "streets of said city, amounting to miles and miles of "streets, there is no protection against fire, owing to the "fact that said water supply company has not laid "its mains on those streets, and hence could not erect "fire hydrants or plugs thereon." The answer is responsive to the allegations of the bill, which called for it

under oath, and must be overcome by the testimony of two witnesses, or one witness with corroborating circumstances.

Latta vs. Kilbourn, 150 United States, 524.

The testimony of D. M. N. Ross, (Record, page 146,) C. B. Percy, (Record, page 158,) Matthew Sloan, (Record, pages 163, 164 and 165,) fully support the charge made in the answer of appellees, that the appellant has never complied with the conditions contained in Section 11 of its charter, and has not therefore secured an exclusive privilege even if it be held that such privilege was to be enjoyed by it upon complying with the conditions precedent imposed in its charter. Conditions precedent must be performed before franchises vest.

Bonham vs. Taylor, 10 Ohio, 108.
Middle Bridge vs. Brooks, 13 Maine, 391, S. C.
29 American Decisions, 510.
People vs. Kingston T. R. R. Co., 23 Wendell, 193.

III.

In the additional brief of the appellant on page 2, it is claimed that the appellant is now supplying the City of Mobile with water under a contract. The contracts made exhibits to the bill, show that they expired by limitation on July 1st, 1900.

Bienville Water Supply Company, vs. Mobile, 175 U. S. 109.

In conclusion, we respectfully state that the water-works which the City of Mobile was authorized by the General Assembly of Alabama to build, has been completed and is now in operation, and that the $750,000 in bonds that said city was authorized to issue to pay for said water-works and sewer systems, have been issued, and are now in the hands of bona fide purchasers for value.

All of which is respectfully submitted.

B. B. BOONE,
E. L. RUSSELL,
Counsel for Apellees.

No. 126.

Brf. of Boone & Russell for Appellees

Office Supreme Court U.S.
FILED
DEC 9 1901
JAMES H. McKENNEY,
Clerk

No. 126. October Term, 1901.

Filed Dec. 9, 1901.

In the Supreme Court of the United States

THE BIENVILLE WATER SUPPLY COMPANY,
Appelant,

vs.

THE CITY OF MOBILE AND JOHN CURTIS BUSH,
Mayor Thereof, Appellees.

BRIEF FOR THE APPELLEES UPON THE MERITS.

B. B. BOONE,
E. L. RUSSELL,
Counsel for Appellees.

In the Supreme Court of the United States

OCTOBER TERM, 1901.

No. 126.

THE BIENVILLE WATER SUPPLY COMPANY,
Appellant,

VS.

THE CITY OF MOBILE, et al., Appellees.

BRIEF OF THE APPELLEES ON THE SUBMISSION OF THE CAUSE ON THE MERITS.

We contended in our briefs filed in support of the motions of the appellee to dismiss or affirm, (which motions were by the order of this court made on October 22nd, 1900, continued until this cause should come on for hearing upon the merits), that the General Assembly of Alabama was authorized by Article 1, Section 23, and Article XIV, Sections 1, 2 and 10 of the Constitution of Alabama, to amend, alter or revoke the charter of any corporation created since the adoption of the Constitution of 1875, whenever in the opinion of the General Assembly such charter was injurious to the citizens of the State; and that the General Assembly was the sole and final judge as to when a charter was injurious to the citizens of the State; and also was sole judge as to what was necessary to be done in amending or repealing a charter, (*the franchise*), so that no injustice shall be done to the corporators.

Counsel for the appellant in their briefs in opposition to the motions to dismiss or affirm, assert that we have cited to this court no authorities in support of our contention, so we will now cite additional authorities.

The following provisions of the Constitution of Alabama of 1875, contain the power reserved by the State to

alter, amend or revoke the charters of corporations created by it.

Article I, Section 23: "That no expost facto law, or "any law impairing the obligation of contracts, or "making any irrevocable grants of special privileges or immunities, shall be passed by the General Assembly."

Article XIV, Section 1: "Corporations may be "formed under general laws, but shall not be created by "special act, except for municipal, manufacturing, "mining, immigration, industrial, and educational pur- "poses, or for constructing canals, or improving navi- "gable rivers and harbors of this State, and in cases "where, in the judgment of the General Assembly, the "objects of the corporation cannot be attained under "general laws. All general laws and special acts passed "pursuant to this section may be altered, amended, or "repealed."

Article XIV, Section 2: "All existing charters or "grants of special or exclusive privileges, under which a "bona fide organization shall not have taken place and "business been commenced in good faith, at the time of "the ratification of this Constitution, shall thereafter "have no validity."

Article XIV, Section 10: "The General Assembly "shall have the power to alter, revoke, or amend any "charter of incorporation now existing, and revocable "at the ratification of this Constitution, or any that may "thereafter be created, whenever, in their opinion, it "may be injurious to the citizens of the State; in such "manner, however, that no injustice shall be done to the "corporators. No law hereafter enacted shall create, "renew, or extend the charter of more than one corpora- "tion."

It will be observed that the only difference between Article XIV, Section 10, of the Constitution of Alabama, and Article XVI, Section 10 of the Constitution of Pennsylvania, is that in the Alabama Constitution the word "State" is used, and in the Pennsylvania Constitution the word "Commonwealth" is found.

Article XVI, Section 10, of the Constitution of the State of Pennsylvania, is as follows :

"The General Assembly shall have the power to "alter, revoke or annul any charter of incorporation "now existing and revocable at the adoption of this "Constitution, or any that may hereafter be created, "whenever in their opinion it may be injurious to the "citizens of this commonwealth, in such manner, how-"ever, that no injustice shall be done to the corporators."

In the case of the Wagner Free Institute vs. Philadelphia, 132 Penn. State Reports, 612; same case, 19 American State Reports 613, the Supreme Court of Pennsylvania, through Mr. Justice Mitchell, said: "But "this case has been argued and may be confidently "rested on broader grounds. Counsel have presented "two questions, assuming that the real estate in this "case is an endowment: 1. Can the State repeal the "exemption? and 2. Has it done so? Upon the first "question, there can be no substantial doubt. The ex-"emption can only exist by virtue of the amended char-"ter of 1864. But this, of course, is subject to the legis-"lative power, under the amendment of 1857, to the Con-"stitution, to alter, revoke, or annul any charter there-"after granted. Under the Constitution of the United "States and the decisions of the Supreme Court, a char-"ter is ordinarily a contract; but a charter which is re-"vocable at the will of the grantor is only a quasi con-"tract, and approaches much more closely to the charac-"ter of a license. To such a charter the rule of the "Dartmouth College case does not apply, and the deci-"sions are uniform to this effect. No question under the "Constitution of the United States, therefore arises in "this case.

"But it is argued that the legislative right of revo-"cation only exists when the privileges granted become "'injurious to the citizens of the commonwealth,' and "that the legislature is not the final and absolute judge "of what is so injurious. Expressions frem the opinions "of this court in several cases are cited in support of this "argument, but none of the decisions, examined upon "their facts, really sustain the contention of the appel-

"lant here. The strongest expression is found in Com-
"monwealth vs. Pittsburg, etc., R. R. Co., 58 Pa., St. 26,
"where Sharswood, J., says: "That case (Erie, etc., R.
"R. Co. vs. Casey, 26 Pa. St., 287) must be considered
"as authority in this State for the position that the legis-
"lature is not the final judge of whether the casus
"foederis, upon which the authority to repeal is based
"has occurred." This language is quoted with approval
"by Gordon, J., in Hays vs. Commonwealth, 82 Pa. St.,
"12, and this latter case, in turn, by the present Chief
"Justice in Williamport Pass R. R. Co.'s Appeal, 120 Pa.
"State, 12. But in Commonwealth vs. Pittsburg, etc.,
"R. R. Co., 58 Pa. St., 26, the charter involved was
"granted before 1857, and by its terms limited the power
"of repeal to the contingency of "misuse or abuse of the
"privileges granted;" and it was of this provision that
"Justice Sharswood used the language quoted. The case
"itself turned on the railroad company's denial of any
"violation of its charter since a condoning statute, and
"the admission of the truth of that defense by the com-
"monwealth's demurrer. Hays vs. Commonwealth, 82
"Pa. St., 523, and Williamsport Pass. R'y Co.'s Appeal,
"120 Pa. St., 12, decide only that the present Constitu-
"tion does not repeal charters previously granted; and
"the general language of the opinions is used with ref-
"erence to the intent of the instrument, rather than to
"the power to repeal if the intention to do so were clear.

"The language of the Constitutional Amendment of
"1857, is, that the legislature may alter or revoke any
"charter whenever, "in their opinion, it may be injuri-
"ous." The same language is repeated in the present
"Constitution, Article XVI, Section 10. Exemptions
"from taxation is a subject of inherent public interest.
"It is a dimunition of a supreme prerogative of the State
"to raise revenue necessary to its existence. It is at all
"times a legislative question, and we do not see how the
"right of the legislature to determine whether, in any
"particular class of cases, an exemption is "injurious to
"the commonwealth" can be doubted; and by the first
"section of Article IX of the Constitution, the legisla-
"ture is imperatively restricted to dealing with it by

"general laws. We think it clear, therefore, that the "legislature, under the authority reserved by the Consti- "tution of 1857, could at any time repeal the exemption "in the plaintiff's charter, and do so by a general law."

The Constitution of Arkansas of 1874, Article XII, Section 6, ordains: "Corporations may be formed under "the general laws; which laws may, from time to time, "be altered or repealed. The General Assembly shall "have the power to alter, revoke, or annul any charter "of incorporation now existing and revocable at the "adoption of this Constitution, or any that may here- "after be created, whenever, in their opinion, it may be "injurious to the citizens of this State; in such manner, "however, that no injustice shall be done to the corpor- "ators."

In Leep vs. St. Louis, etc., Ry. Co., 58 Arkansas, page 428, Battle, Justice, after quoting the Constitution of 1874, as above set out and referring to the Constitution, said: (bottom of page 427 and page 428) "But "what is true of persons is not always true of corpora- "tions. Natural persons do not derive the right to con- "tract from the legislature. Corporations do. They "possess only those powers or properties which the char- "ters of their creation confer upon them, either expressly "or as incidental to their existence; and these may be "modified or diminished by amendment or extinguished "by the repeal of the charters. * * * * Under "these Constitutions the General Assembly has enacted "statutes providing for the organization of corporations; "and from them the corporations of this State derive "their powers subject to the power of the legislature to "change them by amending the laws under which they "were organized." After quoting many of the decisions of this court discussing the reserved power of States to amend charters granted by them, the learned Justice thus continues at page 435: "Whenever the charters of "railroad companies become obstacles in the way of the "legislature so regulating their roads as to make them "subserve the public interest to the fullest extent practi- "cable, their charters are, in that respect, injurious to "the citizens of the State, and can be amended, as to de-

"fects, in such manner as will be just to the corporators. "For they are organized for a public purpose, and their "roads are declared by the Constitution to be public "highways, and they are made common carriers. They "are clothed with a public trust and, in many respects, "are expressly subjected by the Constitution to the con- "trol of the legislature. There is no enterprise in which "the public is so largely interested as it is in the success- "ful and efficient operation of railroads. With the trust "with which they are clothed is imposed the duty to "serve the public as common carriers in the most efficient "manner practicable. For this reason the legislature "may impose upon them such duties as may be reason- "ably calculated to secure such results. Being created "by statute, the legislature may so change them by "amendment as to make them subserve the purpose for "which they were created"

In St. Louis, Iron Mountain and Southern Railway Company vs. Paul, 64 Arkansas, at page 83; same case, 62 American State Reports, 154, referring to the provision of Article XII, Section 6, of the Constitution of Arkansas, the Supreme Court of that State said: "The "powers conferred upon them by their charters may be "modified or diminished by amendment, or extinguished "by the repeal of the charters." At page 89 the court said: "The act of March 25, 1889, does not interfere "with the disposition or control of the property of rail- "road companies, with their vested rights, or with con- "tracts already made. All it requires them to do is to "pay the wages earned by their servants or employes "under contract entered into after its enactment, at the "time they discharge them or refuse to give them further "employment. The effect of this requirement is to make "the wages payable at the time of the discharge or re- "fusal to employ, and to limit the right to contract. But "this right was derived from the laws under which the "railroad companies were organized, and, according to "the cases cited, (decisions of this court) was subject to "be limited, regulated and controlled by the general "assembly, under the constitution of this State, WHEN- "EVER, IN ITS OPINION, it may be beneficial to the public,

"in such manner as may be just to the corporators. "Consequently, no right of the railroad companies was "violated by the act limiting the right to contract." This case was affirmed by this court on a writ of error to the Supreme Court of Arkansas, in St. Louis, Iron Mountain and Southern Railway Company vs. Paul, 173 U. S., 404.

The Constitution of Georgia of 1877, provides: (Code of Georgia, 5731, (5026) Par. 3. "No grant of special privi- "leges or immunities shall be revoked, except in such "manner as to work no injustice to the corporators or "creditors of the corporation."

It will be observed that this instrument does not contain the provision, "whenever in their opinion it may be "injurious to the citizens of the State," as is the case in the Constitutions of Alabama, Pennsylvania and Arkansas, and yet it was held by the Supreme Court of Georgia in construing this constitutional provision, that the amendment of a charter under the reserved power in the Constitution, was primarily a legislative question. In speaking of the provision of the Constitution of Georgia, above quoted, the Supreme Court of Georgia, through Chief Justice Bleckley, in Macon and Birmingham R. R. Co. vs. Gibson, 85 Georgia, 1, said:

"If such an alteration as this cannot be made, "(changing the route of a railroad through a county), it "is difficult to imagine any material alteration that "could be made; and, of course, if the reserved power "of changing, modifying and destroying will not em- "brace material alterations, the reservation is useless "and worthless. No part of the company's line in Upson "County being yet constructed, none of the company's "property is taken or destroyed by the amendment. A "portion of the franchise to locate the line at will is "withdrawn, and the amendment takes away nothing "else; it simply resumes what the State could have "withheld in granting the charter if the legislature had "been so disposed. For this reason, if not for others, "such cases as Detroit vs. Detroit, etc., Road Co., 43 "Mich., 140, are without application to the question be- "fore us. The authorities more directly in point are "such as Tomlinson vs. Jessup, 15 Wall., 454; Miller vs.

"State, 15 Wall., 478; and Railroad Company vs. Geor-
"gia, 98 U. S., 359. Where an attempt is made to deprive
"a corporation of its *property* by amending its charter,
"doubtless the observations of Cooley, J., in Detroit vs.
"Detroit, etc., Road Company, 43 Mich., 140, ought to be
"recognized as sound. He says: "But for the provi-
"sion of the Constitution of the United States which
"forbids impairing the obligations of contracts, the
"power to amend or repeal corporate charters would be
"ample without being expressly reserved. The reserva-
"tion of the right leaves the State where any sovereignty
"would be if unrestrained by express constitutional lim-
"itations, and with the powers which it would then pos-
"sess. It might therefore do what it would be admis-
"sible for any constitutional government to do when
"not thus restrained, but it could not do what would be
"inconsistent with constitutional principles. And it can
"not be necessary at this day to enter upon a discussion
"in denial of the right of the government to take from
"either individuals or corporations any property which
"they may have rightfully acquired. In the most arbi-
"trary times such an act was recognized as pure tyranny
"and it has been forbidden in England ever since the
"Magna Charta, and in this country always. It is imma-
"terial in what way the property was lawfully acquired;
"whether by labor in the ordinary avocations of life, by
"gift or descent, or by making profitable use of a fran-
"chise granted by the State; it is enough that it has be-
"come private property, and is then protected by the
"law of the land."

"No constitutional principles are infringed by exer-
"cising a reserved power to revoke special privileges or
"immunities, unless the provision of our own Consti-
"tution is violated, which forbids doing it in such man-
"ner as to work injustice to the corporators or creditors
"of the corporation. Whether the mode adopted by the
"legislature in a given instance is just in this respect or
"not, whilst primarily a legislative question may, if pal-
"pably decided wrong, become a judicial one."

After the decision of this court in the Dartmouth College case, to prevent a charter granted by the legisla-

ture from becoming irrepealable, most of the States of the Union passed general laws or made provision in their Constitutions, that all laws thereafter enacted creating corporations, should be subject to amendment, revocation or repeal. Looker vs. Maynard, 179 U. S., 46.

In the Constitution of Alabama of 1875, this subject seems to have been considered of paramount importance, as it is dealt with in Article I, Section 23, and in Article XIV, Sections 1, 2 and 10. It seems to us that the phrase used in Article XIV, Section 10, "in such manner, however, that no injustice shall be done to the corporators," was put into the Constitution after the other sections to which we have referred, to prevent any oppression or wrong being done to corporators in reference to the *property* acquired by corporations while exercising their franchises, and to prevent interference with lawful contracts made by corporations while exercising their charter privileges. Among the framers of the Constitution of Alabama of 1875, were many eminent lawyers, and they must have known of and had in mind such decisions as that rendered by the Supreme Court of Massachusetts in Commissioners, etc., vs. Holyoke Water Power Company, 104 Mass., 451; same case, 6 American Reports, 247, decided at the March term, 1870, wherein speaking of the reserved power to amend or repeal the charters of corporations, Mr. Justice Gray, in delivering the opinion of the court, said: "It is sufficient now to say that it is "established by adjudications which we cannot disre-"gard, and the principles of which we fully approve, "that it at least reserves to the legislature the authority "to make any alteration or amendment in a charter "granted subject to it that will not defeat or substanti-"ally impair the object of the grant, or any rights which "vested under it, and that the legislature may deem "necessary to secure that object, OR OTHER PUBLIC OR "PRIVATE RIGHTS." and of the decision of this court in Miller vs. the State, 15 Wall., 498, decided January 6th, 1873, wherein Mr. Justice Clifford for this court, said: "It may be safely affirmed that the reserved power may exercised, and to almost any extent, to carry into offect the original purposes of the grant, *or* to secure the due

administration of the affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets," and of the decision of this court affirming the decision of the Supreme Court of Massachusetts in the case above cited, Holyoke Water Power Co. vs. Lyman, 15 Wallace, 519, decided February 10th, 1873, wherein Mr. Justice Clifford, for this court, said: "*To protect the rights of the public* and of the corporators, or to promote the due administration of the affairs of the corporation." We believe the framers of the Constitution of Alabama of 1875, when they put into that instrument Section 10 of Article XIV, after having already inserted Article I, Section 23, and Sections 1 and 2 of Article XIV, had in mind the idea that is thus expressed by Mr. Justice Field in the Railroad Tax Cases, 13 Federal Reporter, 754: "It (the State) may confer, by its gen- "eral laws, upon corporations, certain capacities of doing "business, and of having perpetual succession in their "members. It may make its grants in these respects "revocable at pleasure; it may make the grant subject "to modifications, and impose conditions upon its use, "and reserve the right to change these at will. But "whatever property the corporation acquire in the exer- "cise of the capacities conferred, they hold under the "same guaranties which protect the property of individ- "uals from spoliation. It cannot be taken for public use "without compensation. It cannot be taken without due "process of law, nor can it be subjected to burdens dif- "ferent from those laid upon the property of individuals "under like circumstances. The State grants to railroad "corporations formed under its laws, a franchise, and "over it retains control, and may withdraw or modify it. "By the reservation clause it retains power only over "that which it grants, it does not grant the rails on the "road; it does not grant the depots alongside of it; it "does not grant the cars on the track, nor the engines "which move them, and over them it can exercise no "power except such as may be exercised through its "control over the franchise, and such as may be exer- "cised with reference to all property used by carriers for "the public. The reservation of power over the fran-

"chise—that is, over that which is granted—makes its "grant a conditional or revocable contract, whose obli- "gation is not impaired by its revocation or change." We insist that it was never intended by the framers of the Constitution of Alabama by Section 10 of Article XIV, to nullify the provisions of Article I, Section 23, and Article XIV, [Sections 1 and 2, all of these provisions of the Constitution must be construed together. That it was intended by Section 10 of Article XIV to prevent just what this court decided could not be done, in the opinion delivered by Mr. Chief Justice Waite in the Sinking Fund Cases, 99 United States, 700, wherein it is said: "All agree that it (the reserved power), cannot be used "to take away property already acquired under the op- "eration of the charter, or to deprive the corporation of "the fruits actually reduced to possession of contracts "lawfully made," and as put by Mr. Justice White in Stearns vs. Minnesota, ex. rel. Marr., 179 U. S., page 259: "Before examining the scope of the act relied upon, it is "important to bear in mind the relations which are en- "gendered when a contract is entered into by a State "subject to the reserved power to repeal, alter or amend. "In such case no irrepealable contract, protected from "impairment under the Constitution of the Uniten States "takes effect, because it is impossible to conceive that "contract rights which are conferred subject to the "power of repeal, alteration or amendment are protected "from an impairment which under the terms of the "grant the State has reserved the right to make. Louis- "ville vs. Bank of Louisville, 174 U. S., 439-444; Citizens "Bank of Owensboro, 173 U. S., 636-644, et. seq.

"But whilst this is settled, it has also been equally "determined that the reserved right to repeal, alter or "amend does not confer mere arbitrary power, and can- "not be so exercised as to violate fundamental principles "of justice by depriving of the equal protection of the "laws or of the constitutional guaranty against the "taking of property without due process of law. St. "Louis, I. M. & S. R. R. Co. vs. Paul, 173 U. S., 404-408, "and cases cited. And an apt illustration of the appli-

"cation of this doctrine is found in Louisville Water Co. "vs. Clark, 143 U. S., 1."

II.

In the amended bill (Record, page 65), and in the briefs of counsel, it is charged that under the Constitution of Alabama, Article I, Section 37, and Article IV, Sections 50, 54 and 55, the city of Mobile cannot be authorized by the general assembly of Alabama to operate a system of water works to supply its inhabitants with water for domestic and sanitary purposes. The provisions of the Constitution of Alabama referred to read as follows:

Article I, Section 37: "That the sole object and only "legitimate end of government is to protect the citizen "in the enjoyment of life, liberty and property; and "when the government assumes other functions, it is "usurpation and oppression."

Article IV, Section 50: "The General Assembly "shall not have power to authorize any municipal cor- "poration to pass any laws inconsistent with the general "laws of this State."

Article IV, Section 54: "The State shall not engage "in works of internal improvement, nor lend money or "its credit in aid of such; nor shall the State be inter- "ested in any private or corporate enterprise, or lend "money or its credit to any individual, association, or "corporation."

Article IV, Section 55: "The General Assembly "shall have no power to authorize any county, city, town, "or other sub-division of this State, to lend its credit, or "grant public money or thing of value, in aid of, or to "any individual, association, or corporation whatsoever, "or to become a stockholder in any such corporation, "association, or company, by issuing bonds or otherwise."

When a city furnishes its inhabitants with an abundance of pure water, how can it be said that it is violating Article I, Section 37, of the Constitution, which provides that the sole "object and only legitimate end of govern- "ment is to protect the citizen in the enjoyment of life, "liberty and property?"

In the Standard Dictionary the word "protect" is defined: "To keep, as from harm, detioration, danger, "temptation, or any other evil, by interposition, active "or passive; preserve in safety; guard; shield; defend: "said of both persons and things with wide range of "meaning." In the case of the Intendant and Town Council of Livingston vs. Pippen, 31 Alabama, 542, decided in 1858, Justice George W. Stone for the Supreme Court of Alabama, said: "The Intendant and Town "Council of Livingston have the ordinary public powers "which are conferred on municipal corporations. The "express grants of power are copied in the opening of this "opinion. Nothing is more important as a sanitary and "police regulation, than an abundant supply of pure "water. Its uses are too well known to require notice "here. We hold, that the corporate authorities had the "power, as such, to procure water on the public square "of the town of Livingston."

It seems to us that the operation of water works by the the City of Mobile, is not passing "any laws inconsistent with the general laws of this State," hence is not in violation of Article IV, Section 50, of the Constitution of Alabama; and that it is too clear for argument that the word "laws" as used in this section of the Constitution, refers to rules of action prescribed to enforce justice and duty; rules of civil conduct to be prescribed by a municipality. We submit that the internal improvements meant in the Constitution, Article XIV, Section 54, were of the character of turnpikes, canals, railroads, etc. That sections 54 and 55 of Article IV did not prohibit the general assembly from authorizing the City of Mobile to build and operate water works, we quote the case of Sheppard vs. Dowling, 28 Southern Reporter, 795, decided by the Supreme court of Alabama, May 10th, 1900: "The "framers of the Constitution of Alabama were careful "to differentiate the State from municipal sub-divisions, "towns, cities, and counties in respect of what is forbid- "den to be done by the State, considered as a separate "entity, on the one hand, and what the general assem- "bly is inhibited to authorize such sub-divisions to do "on the other; and they embodied in the instrument two

"distinct provisions, having reference severally to the "State and its said municipalities, containing, respectively the one all the limitations intended to be ordained in "this connection upon the powers of the State as such, and "the other all the limitations intended to be put upon "the power of the legislature in respect to authorizing "action by counties and towns. This is the ordinance "as to the State, (Article IV, Section 54): The State "shall not engage in works of internal improvement, "nor lend money or its credit in aid of such; nor shall "the State be interested in any private or corporate "enterprise, or lend money or its credit to any individual, "association, or corporation." And this as to the towns "and counties (Section 55): "The general assembly "shall have no power to authorize any county, town, or "other sub-division of this State to lend its credit, or to "grant public money or thing of value, in aid of, or to "any individual, association, or corporation whatsoever, "or to become a stockholder in any such corporation, "association or company, by issuing bonds, or otherwise." There is a notable absence from this last ordinance of any inhibition upon the legislature to authorize towns and counties to engage or be interested in "private enterprises, and the intent of the members of "the constitutional convention to leave the general "assembly a free hand in this connection is emphasized "and made to stand out in bolder relief by the inclusion "of such a provision in the immediately preceding section, having reference solely to the State as an entity "distinct from such sub-divisions. And this intent is "further borne out and sustained by reference to the "history of the times just preceding the framing of this "constitution, and to the conditions then existing, from "which it is clearly deducible that enterprises of the "nature provided for in the act under consideration were "not among the evils which the convention had in mind "and purposed to provide against it by this ordinance, "limiting legislative power in respect of authorizations "to towns and counties. Garland vs. Board, 87 Alabama, "223. Hence our conclusion that it was entirely competent for the general assembly to authorize towns and

"counties to carry on the liquor traffic as an incident to "the regulation of that traffic provided for by this act."

If cities, towns or counties may be authorized by the general assembly to sell liquors to their inhabitants. surely it will not be held that such sub-divisions of the State cannot be authorized by the general assembly to sell water to their inhabitants.

This court has again and again announced that it would follow the construction put upon the constitution of a State by its highest court.

Brown vs. New Jersey, 175 U. S., page 174.
Erb as Receiver, vs. Morasch, 177 U. S., 584.

We insist that in passing the several acts authorizing the City of Mobile to build a system of water works, and the act amending the charter of the appellant, the general assembly of Alabama had unlimited power, except so far as restrained by the constitutions of the United States and of Alabama, and if these acts do not violate any provision of the Federal or State constitution they cannot be annulled by the courts, whether their provisions are wise or unwise, or whether their operation be hurtful or beneficial.

Henley vs. State, 98 Tenn., at page 679.
Cooley's Constitutional Limitations (6th Ed.,) 200-201.

We reiterate what we claimed in our briefs in support of the motion to dismiss or affirm, filed at the October Term, 1900, that there is no contract existing between the State of Alabama and the appellant, the Bienville Water Supply Company. The Supreme Court of Alabama passed upon this question in the case of the City of Mobile vs. Bienville Water Supply Company, 30 Southern Reporter, 446, decided June 11th, 1901. The court said:

"It cannot be pretended that in granting a charter "to the complainant company in 1883, the legislature "conferred on that company any exclusive privilege for "supplying the City of Mobile and its inhabitants with "water. All rights not exclusively granted to the com- "plainant were reserved, and the rights thus reserved

"included the granting of a franchise to another cor-
"poration to carry on the same business in the same
"territory. While the effect of granting such a fran-
"chise afterwards, to the city, might be to impair, and
"possibly by fair competition, to ultimately largely de-
"stroy the value of the complainant's plant, it would
"not be in excess of legislative power to grant the fran.
"chise to the city, nor would it in anywise infringe the
"federal constitution, prohibiting a State legislature
"from passing laws impairing its obligation. If there is
"no contract, there is nothing in the grant on which the
"constitution could act. The element of a contract by
"the State with the complainant company, did not enter
"into the grant of its franchise to establish and operate
"a system of water works in Mobile. Stone vs. Missis-
"sippi, 101 U. S., 814; Skaneateles Water Works Co. vs.
"Village of Skaneateles. 161 N. Y., 154; Charles River
"Bridge vs. Warren Bridge, 11 Peters, 420; State vs.
"City of Hamilton, 47 Ohio St., 52; Scranton Electric
"Light & Heat Co's. Appeal, 122 Pa. St., 154; 2 Beach,
"Priv. Corp., Sections 22, 27."

The record discloses no breach of the obligation of a contract entered into by and between the State of Alabama and the appellant, and the decree of the Circuit Court should be affirmed.

Respectfully submitted,

B. B. BOONE,
E. L. RUSSELL,
Counsel for Appellees.

Supreme Court of the United States.

No. 126.—October Term, 1901.

The Bienville Water Supply Company, Appellant, *vs.* The City of Mobile and John Curtis Bush, Mayor thereof. } Appeal from the Circuit Court of the United States for the Southern District of Alabama.

[June 2, 1902.]

On February 21, 1899, the appellant, as complainant, filed its bill in the Circuit Court of the United States for the Southern District of Alabama to restrain the city of Mobile from building or operating prior to July 1, 1908, or before the city should have purchased the waterworks of the complainant, any system of waterworks connected with or having for its source of supply any stream of water in Mobile County. Upon answer and proofs the Circuit Court entered a decree dismissing the bill, whereupon an appeal was taken directly to this court.

The facts are these: In 1840 the city of Mobile made a contract with Albert Stein, which was ratified by an act of the legislature of the State, January 7, 1841. By this contract Stein received the exclusive right to supply the city with water from a stream called Three Mile Creek, and the city the right to purchase his plant at a price to be fixed by arbitration. Stein constructed his plant, and it was for many years the sole source of supply. But it was not satisfactory, and hence the charter to the appellant. This charter was granted by two statutes, dated respectively February 19, 1883, and February 14, 1885. By these statutes the company was given all the rights vested by contract or law in the city to purchase the Stein franchise and plant, and for that purpose was to be considered the assignee of the city; also generally the right to acquire by contract with the owners any franchise and plant for supplying Mobile with water, and in case of disagreement with the owners as to price, the right to condemn and take the said franchise and plant under the State's right of eminent domain. It was given for twenty years, and until a purchase of its plant by the city the exclusive right to supply the city with water from any source in the county of Mobile, other than Three Mile Creek, (the Stein source of supply,) and when it should acquire the Stein franchise the exclusive right from that creek also, subject to this proviso:

"But nothing in this act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company."

It was required to begin its work within four years and to supply water within six years. It was also required to supply water at a cost to the consumers, not exceeding certain maximum rates fixed by the act, and to put fire plugs on any square at the request of the owners of three-fourths of the improved property thereon. After twenty years the city was given the right to purchase the plant of the company at a price to be fixed by arbitration.

The owners of the Stein franchise endeavored by litigation to prevent the erection of the appellant's plant, but a decree in favor of the Bienville company was affirmed by this court. (141 U. S. 67.)

Appellant constructed its plant and supplied the city of Mobile with water under contracts, the last of which would not have expired until July 1, 1900.

By an act of February 23, 1899, (Local Acts Ala. 1898–99, p. 1689,) its charter was amended by striking out the word "exclusive," thus leaving a grant, but not an exclusive grant.

By an act of February 6, 1897, a new charter was granted to the city of Mobile, and by its terms express authority was given to the city to build or acquire public works, subject to the approval of its citizens by a majority vote. On August 2, 1897, there was submitted to vote and approved by a majority of citizens a proposition that the city should purchase, build or otherwise acquire a system of waterworks to cost not exceeding $500,000 and a system of sewerage to cost not exceeding $250,000, to be paid for by bonds secured by a mortgage upon said public works.

By other statutes the city was given power to issue bonds secured by a mortgage on any plant which it should buy or construct; also power to acquire or condemn any property and the water of any stream in Mobile County excepting only Clear Creek, the source of appellant's supply of water; and, third, to condemn all interest, legal or equitable, not owned by the city in the Stein plant.

Nothing had been done by the appellant under the right given it to purchase or condemn the Stein franchise and property, although its treasurer had in its behalf purchased interests in such franchise and property amounting to 54 28-100 per cent of the full value thereof. On February 18, 1898, the city council passed a resolution to purchase the Stein franchise and property. An arbitration was held, and on its report the city took possession of the property and filed a bill against the treasurer of the appellant to compel him to carry out the arbitration and purchase. The Circuit Court, however, held the arbitration illegal, and dismissed the bill.

On February 21, 1899, appellant brought in the Circuit Court of the United States a suit in equity against the city. In the bill was set forth the contracts of appellant with the city, and it was contended that there was an implied agreement by the latter not to enter into competition.

This suit was dismissed by the Circuit Court, and its decree was affirmed by this court. (175 U. S. 109.) The present bill, filed on the same date, is based on the rights given to the appellant by its charter, and it is contended that any legislation authorizing the city to violate such charter rights is in conflict with that clause in the first paragraph of section 10 of article I of the Federal Constitution, which prohibits a State from passing any law impairing the obligations of contracts.

The constitution of Alabama (1875), which was in force at the time of the transactions herein referred to, contained these several provisions:

"Article I, section 23: That no *ex post facto* law, or any law impairing the obligation of contracts, or making any irrevocable grants of special privileges or immunities, shall be passed by the general assembly."

"Article XIV, section 1: Corporations may be formed under general laws, but shall not be created by special act, except for municipal, manufacturing, mining, immigration, industrial and educational purposes, or for constructing canals, or improving navigable rivers and harbors of this State, and in cases where, in the judgment of the general assembly, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered, amended or repealed."

"Article XIV, section 2: All existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business been commenced in good faith, at the time of the ratification of this constitution, shall thereafter have no validity."

"Article XIV, section 10: The general assembly shall have the power to alter, revoke or amend any charter of incorporation now existing and revocable at the ratification of this constitution, or any that may thereafter be created, whenever, in their opinion, it may be injurious to the citizens of the State; in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation."

Mr. Justice BREWER delivered the opinion of the Court.

There is such a similarity between the two suits commenced by plaintiff on Februrary 21, 1899, as suggests a question whether the decision of the one should not be conclusive as to the disposition of the other. The parties were the same. In each the plaintitiff set forth its charter and its contracts with the city, and each prayed a decree restraining the city from building or operating any system of waterworks for supplying the city. It is true the bill in the first case counted specially on the contracts made between the plaintiff and the city, and sought a restraint of the city only during the life of those contracts, while the bill in this case sets up more at large the charter rights of the plaintiff as given by the statutes of the State, contends that those rights are infringed by the subsequent legislation of the State and the action of the city thereunder, and seeks to restrain the city during the twenty years named in the plaintiff's charter and until the

city shall buy the plaintiff's plant. But each of these seeks to restrain the city from the time of filing the bill. All the rights which the plaintiff had by virtue of its charter and all the violations of such rights caused by the legislation of the State and the action of the city existed at the time of the filing of the bills and during the lifetime of the contracts with the city, and could have been presented in the first suit and been among the matters to be considered in determining whether the plaintiff was entitled to the injunction sought. If the plaintiff was not entitled to an injunction during the lifetime of the contracts with the city it is not entitled to any similar relief after the expiration of those contracts. In other words, the plaintiff failed to set up in the first suit all its grounds of relief. Can it be permitted in this to set up additioual grounds and obtain the very relief sought in the prior suit as well as additional relief, the same in kind though longer in duration? Will the law permit the splitting up into separate suits of different grounds for the same relief? Will not the judgment or decree in the first be held a final adjudication of the rights of the parties? It appears that the decree in the other suit was rendered in the circuit and affirmed in this court about seven months before the decision of the present case in the Circuit Court. As against this it may be said that the decree in the other suit was neither pleaded nor proved, and no question of *res judicata* can be considered unless the earlier decision is formally presented on the hearing of the later case. This, doubtless, is technically true, but we take judicial notice of our own records, and, if not *res judicata*, we may, on the principle of *stare decisis*, rightfully examine and consider the decision in the former case as affecting the consideration of this.

But, passing this matter, and leaving out of consideration the special contracts directly between the plaintiff and the city, let us inquire whether any contract rights given to plaintiff by its charter have been violated by subsequent legislation of the State, and the action of the city under such legislation. Plaintiff contends that under its charter, as created by the acts of 1883 and 1885, it acquired the exclusive right to supply the city of Mobile with water from any stream in the county of Mobile, except Three Mile Creek, and the right to purchase or condemn the Stein franchise and plant for supplying the city with water from Three Mile Creek; that by the later legislation such exclusive right was in terms taken away, authority given to the city of Mobile to build waterworks and supply the city with water therefrom, and that the city had taken possession of the Stein plant, was operating that and was building a system of waterworks of its own, and that thereby its contract right was impaired in violation of the prohibition of the Federal Constitution.

It becomes therefore necessary to see not only the extent of the rights conferred upon plaintiff, but also under what constitutional conditions it

received its grant, and what power was reserved to the State to modify the terms thereof. In the first place, the plaintiff did not receive the exclusive right to supply Mobile with water. The proviso in the charter reserved to the State the power to charter other companies for such purpose. Obviously the legislature contemplated the fact that in the future other sources of supply and other companies might be necessary in order to furnish an adequate supply for the growing city, and reserved to itself the right to make such provision as it should deem expedient therefor. It is true the companies which might be chartered were not to "interfere with the property rights or the rights of obtaining water pertaining" to the plaintiff. But manifestly "property rights" refer to rights in respect to tangible property, and thus construed the proviso forbade any interference by any new company with the plant of the plaintiff. In addition, it also forbade interference with the "rights of obtaining water pertaining" to the plaintiff. The plaintiff had not at the time of these transactions obtained the Stein franchise for obtaining water from Three Mile Creek, and could only claim an exclusive right of obtaining water from other sources of supply within the county of Mobile.

The plaintiff, therefore, took its charter with notice that it was not given the exclusive right of supplying the city of Mobile with water, and it had not, at the time of these transactions, obtained that which its charter before amendment purported to authorize it to obtain, to wit, an exclusive right to all the sources of supply within the county. In reference to this the Supreme Court of Alabama, in an opinion filed on June 11, 1901, (*City of Mobile* v. *Bienville Water Supply Co.*, 30 Sou. Rep. 446,) and since the decree in the Circuit Court, used this language:

"It cannot be pretended that, in granting a charter to the complainant company in 1883, the legislature conferred on that company any exclusive privilege for supplying the city of Mobile and its inhabitants with water. All rights not exclusively granted to the complainant were reserved, and the rights thus reserved included the granting of a franchise to another corporation to carry on the same business in the same territory. While the effect of granting such a franchise, afterwards, to the city, might be to impair and possibly by fair competition to ultimately largely destroy the value of complainant's plant, it would not be in excess of legislative power to grant the franchise to the city, nor would it in anywise infringe the Federal Constitution, prohibiting a State legislature from passing laws impairing its obligations. If there is no contract, there is nothing in the grant on which the Constitution could act. The element of a contract by the State with the complainant company did not enter into the grant of its franchise to establish and operate a system of waterworks in Mobile. (*Stone* v. *Mississippi*, 101 U. S. 814; *Skaneateles Waterworks Co.* v. *Village of Skaneateles*, 161 N. Y. 154; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *State* v. *City of Hamilton*, 47 Ohio St. 52; *Scranton Electric Light & Heat Co.'s Appeal*, 122 Pa. 154; 2 Beach, Priv. Corp. secs. 22, 27.)"

By article 1, section 23, of the constitution of Alabama the legislature is prohibited from "making any irrevocable grants of special privileges or immunities."

The significance of this provision was considered by the Supreme Court of Alabama in *Birmingham & Pratt Mines Street Railway Company* v. *Birmingham Street Railway Company*, (79 Ala. 465,) in which case it appeared that the city of Birmingham had given what was in terms an exclusive right to the plaintiff to construct a street railway along certain streets, and afterwards had given to the defendant the right to occupy the same streets with a railway. Considering the first grant by the city, the Supreme Court said: "If the power to grant such a franchise resided in this municipality . . . there can be no doubt either of the jurisdiction or of the duty of a court of equity to protect the invasion of the right. . . . If, however, the power in question did not exist, then the grant would be void, so far as it purports to be exclusive in its nature;" and it was held that the city authorities had no power to grant the exclusive right claimed by the plaintiff. In the discussion of the question the court further used this language:

"What, it may be asked, is the nature of these special or exclusive privileges, which are thus prohibited to be granted by the legislature? It seems plain from the very terms used that the evil intended to 'be specially prevented was the granting of exclusive privileges in the nature of a monopoly by the legislative creation of corporate franchises. Monopolies were void at the common law and are not commonly conferred by legislative grant, and need no special prohibition in the organic law of a free republic.'

* * * * * *

"The policy of the law, as now declared by our Constitution, is as clear in the condemnation of the grant of irrevocable exclusive privileges conferred by franchise, as that of the common law was in the reprobation of pure monopolies which were always deemed odious, not only as being in contravention of common right, but as founded in the destruction of trade by the extinguishment of a free and healthy competition. (*The Case of The Monopolies*, 11 Rep. 84.)

"The exclusive right of the appellee to the privilege claimed, in our opinion, cannot be sustained. The general assembly would itself have no power under the constitution to make such a grant."

It is true that this case was not decided until the December term, 1885, which was after the passage of the last of the two statutes granting the charter to the appellant, and it is also true that in considering questions of an alleged State infringement of a contract we are not concluded by the exposition by the courts of the State of the terms of the contract or the effect of the legislation. At the same time, the opinion of the highest court of the State, even in contract cases, is entitled to most respectful consideration, and should not lightly be ignored.

It is contended by the appellant that section 23 of article I must be considered as qualified by section 10 of Article XIV, the section which gives the general assembly power to alter, amend or revoke a charter "whenever, in their opinion, it may be injurious to the citizens of the State; in such manner, however, that no injustice shall be done to the corporators." It is said that while under this provision the judgment of the general assembly upon the question whether the charter is injurious to the citizens of the State may not be subject to judicial examination, yet whether injustice has been done to the corporators is in the very nature of things a judicial question, and one which no action of the legislature can preclude the courts from considering. As a corollary from this it is argued that if in the opinion of the courts the attempted revocation works injustice to the corporators it will be adjudged an invalid exercise of legislative power. This section is a new one in this court. It is found in the constitutions of more than one State and has been reviewed in some State courts. So far as they have expressed themselves the expressions have been in favor of the right of a judicial review. *Wagner Institute* v. *Philadelphia*, (132 Pa. St. 612,) is cited by the appellee, but that case simply holds that whether the charter is injurious to the citizens is a question of legislative determination, Further than that the opinion does not go. *Leep* v. *Railway Company*, (58 Ark. 407,) is also cited. In that case a statute which in effect amended railroad charters was sustained. In the opinion the propriety of the amendment was discussed, a limitation to its scope declared, and in reference to a possible construction thereof the court observed (p. 436):

"An amendment to that extent would be, manifestly, unjust to the companies, and violative of the constitution, which, while it grants the right to amend when in the opinion of the legislature the charter is injurious to the citizens, limits the right to do so to amendments that are just to the corporators."

Subsequently, in *St. Louis, Iron Mountain & Southern Railway Company* v. *Paul*, (64 Ark. 83,) another section of the same statute was presented and sustained, *Leep* v. *Railway Company* being cited with approval. This case was brought to this court on error and affirmed. (173 U. S. 404.) In *Macon Railroad Company* v. *Gibson*, (85 Ga. 1,) the application of a similar constitutional provision was considered, and upon it the court observed (p. 16):

"No constitutional principles are infringed by exercising a reserved power to revoke special privileges or immunities, unless the provision of our own constitution is violated, which forbids doing it in such manner as to work injustice to the corporators or creditors of the corporation. Whether the mode adopted by the legislature in a given instance is just in this respect or not, whilst primarily a legislative question, may, if palpably decided wrong, become a judicial question."

It does not appear that the Supreme Court of Alabama has passed upon this specific question. We do not think it necessary to determine absolutely the precise meaning of this section or the limits of judicial inquiry under it. It may be simply declaratory, for courts have often held that it was beyond the power of the legislature, under the guise of an act amending or repealing a charter, to take away the property of the corporation. Clearly, the question is, in the first instance, presented for the consideration of the legislature, and a presumption of validity attends its action.

Obviously, from the several constitutional provisions which are quoted in the statement of facts, it was intended that the legislature should have the right of revocation and amendment, and that whoever took a charter should take it subject to that right. To what could such revocation or amendment extend? The possible rights of a corporation group themselves into three classes: First, the right to the tangible property which it may acquire; second, the right to do the specific things which are named in the charter; and, third, the right to exclude others from doing like things. It has been held that the right of revocation or amendment carries with it no right to appropriate the tangible property belonging to the corporation. As said by Chief Justice Waite, speaking of the power of amendment, in *Sinking Fund Cases*, (99 U. S. 700, 720): "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." Nothing of this nature was, however, attempted by this legislation. The plaintiff was left in undisturbed possession of its tangible property. So we need not stop to consider what protection could be afforded if the attempt had been made to take away its property.

The second class includes the powers of action granted to the corporation; in other words, the right to use the tangible property for the purposes of the charter. But none of these powers were taken away from the plaintiff. It was left free to use its plant in supplying the citizens of Mobile with water, and to charge and collect pay for its services. Hence no inquiry is pertinent in respect to the limitations, if any there be, on the right of the legislature to take away such powers.

The remaining class is of those rights which flow from exclusive provisions in the charter—the right to prevent others from doing the same things. It cannot be doubted that such a right is valuable; that, for instance, it would be worth something to the plaintiff to have not only the right of supplying Mobile with water, but also the right to exclude others, and thus prevent all competition. That which gives to a government patent for an invention its chief value is not the right to manufacture and sell the thing invented, but the right to exclude others from so doing—

the monopoly for the prescribed term of years. But the grant of a monopoly is forbidden by the Alabama constitution. As said by its Supreme Court, in the quotation just made: "The general assembly would itself have no power under the constitution to make such a grant."

By a separate section of the constitution it is affirmatively declared that the legislature shall pass no act "making an irrevocable grant of special privileges or immunities." While that body may grant special privileges and immunities, grant franchises to build waterworks, construct railways, or other works of public utility, and by a failure to duplicate a grant make it in effect for the time being exclusive, yet no one legislature can forestall action by a succeeding legislature or bind the State by making the grant in terms exclusive. As much force and effect must be given to section 23 as to any other, and it was obviously the intent that even if exclusive privileges were granted, the monopoly feature thereof should always be subject to revocation. In this section there is no suggestion of amendment or alteration. That which is distinctly provided is the absolute power of revocation. To hold that the exclusive feature of plaintiff's grant could not be revoked because thereby injustice might be done to the corporators, is simply to nullify section 23.

For these reasons we are of the opinion that the decree of the Circuit Court was right, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.